109-357

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 125.

RISSA J. WARNER (FORMERLY RISSA J. BEERS) AND MARY C. FOSTER, APPELLANTS,

vs.

THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1880.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Wednesday, the thirty-first day of March, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fourth.

WILLIAM H. BRADLEY, *Clerk.*

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company *v.* CHARLES G. BEERS, RISSA J. BEERS, MARY C. Foster, Orrington C. Foster, Andrew Brown, William Gribbon, Samuel Barnum, and Stephen Barnum,	In chancery. Original bill.
AND	
MARY C. FOSTER AND RISSA J. BEERS *v.* THE CONNECTICUT MUTUAL LIFE-INSURANCE Company, Charles G. Beers, and Andrew Brown.	Cross-bill.

NORTHERN DISTRICT OF ILLINOIS, *set:*

2 Be it remembered that on the fifth day of March, A. D. 1879, came the said complainant, The Connecticut Mutual Life-Insurance Company, by Junius Mulvey, esq., its solicitor, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, its bond for costs and bill of complaint against said defendant in said entitled cause, which said bond and bill of complaint are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1879.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company *v.* CHARLES G. BEERS ET AL.	In chancery.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any costs taxed against it. Dated this 5th day of March, A. D. 1879.

JUNIUS MULVEY.

3 (Endorsed:) Filed M'ch 5, A. D. 1879. Wm. H. Bradley, clerk.

Bill of Complaint.

4 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the judges of the circuit court of the United States for the northern district of Illinois:

The Connecticut Mutual Life-Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, in the State of Connecticut, and which is a citizen of the State of Connecticut, and at the time of the contract hereinafter set forth and thence hitherto doing business in the State of Illinois, in conformity to the laws thereof, brings this its bill of complaint against Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, Andrew Brown, Samuel Barnum, Stephen Barnum, who are each and all citizens of the State of Illinois, and residents of said northern district of Illinois, and also against William Gribbon, who is a citizen of the State of New York and a resident of said State of New York.

And thereupon, your orator complains and says that one Cyre-
5 nius Beers, then in his life-time, but since deceased, on or about the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, applied to and requested your orator to lend him the sum of twenty thousand dollars ($20,000.00) on the security hereinafter named, and that your orator complied with such request, and did accordingly lend and advance the said sum of twenty thousand ($20,000.00) dollars to the said Cyrenius Beers upon the bond hereinafter set forth, which was expressly declared to be made under and in all respects to be construed by the laws of the State of Illinois.

And thereupon, and in order to secure the repayment thereof to your orator with interest thereon at the rate of eight per centum per annum, payable half yearly, the said Cyrenius Beers duly executed and delivered to your orator *its* certain bond or obligation in writing, sealed with his seal, and bearing date at Chicago the said twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine,
6 in the penal sum of forty thousand ($40,000.00) dollars, conditioned in effect for the payment unto your orator, its successors, or assigns, the principal sum of twenty thousand ($20,000.00) dollars on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy-four, with interest for the same, to be computed from the day of the date thereof at and after the rate of eight per centum per annum, which said interest should be paid half-yearly, to wit, on the twenty-fourth day of each of the months of February and August, which would be in each and every year, until said principal sum should be fully paid, which said interest-payments, until the said principal sum should become due, were specified in and further secured by ten coupons given therewith, and to which said bond there was a proviso added whereby, in effect, it was expressly agreed and fully understood that if default should be made in the payment of any of the interest on the principal sum above mentioned, payable half-yearly as aforesaid, and any portion thereof
7 should remain due and unpaid for the space of 30 days after the same should become due and payable according to the above condition, then and in that case the principal sum above mentioned, together

with all arrearages of interest thereon, should at the option of your orator, its successors or assigns, thereupon become due and payable, and should become collectible, without notice, immediately or at any time after such default, anything therein before contained to the contrary notwithstanding, as by the said bond now in possession of your orator and ready to be produced and proved as your honors shall direct, reference being thereto had, may more fully and at large appear.

And your orator further shows unto your honors, that for the purpose of further securing the repayment to your orator of said sum of money, so loaned as aforesaid, with the interest thereon as aforesaid, the said Cyrenius Beers, together with Mary Beers, his wife, also at the same
8 time executed and delivered unto your orator their certain indenture of mortgage under their hands and seals, bearing date the said twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and made or expressed to be made between the said Cyrenius Beers and Mary Beers as parties of the first part and your orator as party of the second part, and that thereby, after reciting as therein mentioned, it was witnessed that for the better securing the payment of the said sum of money mentioned in the condition of said bond, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by your orator, the receipt whereof was thereby acknowledged, they, the said Cyrenius Beers and Mary Beers, did grant, bargain, sell, alien, release, convey, and confirm unto your orator, its successors and assigns, all that certain lot, piece, or parcel of land situate, lying, and being
9 in the city of Chicago, in the county of Cook and State of Illinois, known and described as being a part of lots number four (4) and five (5), in block number eight (8), in Fort Dearborn addition to Chicago, butted and bounded as follows, to wit, commencing at a point on the north line of said lots fourteen (14) feet east from the northwest corner of said lot four (4), running thence east twenty-seven (27) feet, thence south one hundred and forty (140) feet to the alley on the south line of said lots, thence west along such south line twenty-seven (27) feet, thence north one hundred and forty (140) feet to place of beginning, being the west eighteen (18) feet and four (4) inches of said block five (5) and the east eight (8) feet and eight inches of said lot four (4); together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all
10 the estate, right, title, interest, dower, and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same and every part and parcel thereof, with the appurtenances.

To have and to hold the said granted, bargained, and described premises, with the appurtenances, unto your orator, its successors and assigns, forever; but subject to the proviso therein contained, and said indenture of mortgage was upon the express condition, nevertheless, that if the said Cyrenies Beers and Mary Beers, their heirs, executors, administrators, or assigns, should and did well and truly pay or cause to be paid unto your orator, its successors or assigns, the said principal sum of money mentioned in the condition of said bond, and the interest thereon, at the time and

times respectively and in the manner mentioned in the condition of said bond according to the true intent and meaning thereof, and should
11 and did promptly and faithfully fulfill and perform all the covenants and agreements thereinafter mentioned, that then and thenceforth said indenture of mortgage and the estate thereby granted should cease, determine, and be utterly null and void, anything therein before contained to the contrary notwithstanding; all of which will more fully and at large appear by reference to said indenture of mortgage now, in the possession of your orator ready to be produced and proved as your honors shall direct, and to which for greater certainty your orator prays leave to refer.

And your orator further shows unto your honors that in and by said mortgage the said Cyrenius Beers and Mary Beers waived and released unto your orator all right and benefit in and to the premises herein before and in said mortgage described which they had, or to which they might be entitled, under and by virtue of all laws of the State of Illinois pertaining to the exemption of homesteads.

12 And your orator further shows unto your honors that the execution and delivery of said indenture of mortgage, including the release and the waiver of the right of homestead, was afterwards, to wit, on the twenty-seventh day of February, A. D. 1869, duly acknowledged according to law by the said Cyrenius Beers and Mary Beers.

And your orator further shows unto your honors that afterwards, to wit, on the twenty-seventh day of February, A. D. 1869, said indenture of mortgage was filed for record in the office of the recorder within and for the county of Cook, in the State of Illinois, and was duly recorded therein in book 94 of mortgages, on page 212 et seq., as by the record of said mortgage now remaining in said office, and also by the certificate of Norman T. Gassette, recorder, endorsed upon said indenture of mortgage, signed by said Norman T. Gassette, sufficiently appears and to
13 which said record and certificate thereof your orator prays leave to refer if it be necessary for your orator so to do.

And your orator further shows unto your honors that in and by said mortgage it was covenanted and agreed that the said Cyrenius Beers would well and truly pay or cause to be paid unto your orator, its successors or assigns, the said principal sum of money mentioned in the condition of said bond and the interest thereon according to the said condition.

And your orator further shows unto your honors that on the twenty-fourth day of February, A. D. 1874, when said original bond had fully matured and was not paid, the said Cyrenius Beers came to your orator and requested an extension of time for the payment of said bond, and your orator at his request agreed to extend the time for the payment thereof for the term of five years, and until the twenty-fourth day of February,
14 A. D. 1879, conditionally, however, that the said Cyrenius Beers should thereafter pay interest on said principal sum at the rate of nine per centum per annum, which said interest should be payable half yearly, and should execute in connection with said agreement of extension coupons for the semi-annual payment of said interest, and should promptly pay all such interest when due and do and perform all the other covenants and conditions of said original bond and mortgage, for the further particulars of which agreement your orator refers to the memorandum of

said agreement and to certain coupons attached thereto now in your orator's possession and ready to be produced on the hearing of this cause.

And your orator avers and charges that said Cyrenius Beers did not perform the conditions on which said agreement of extension of the time of payment was made, nor pay the interest on the said moneys secured
15 to be paid by said bond and the extension thereof and by said mortgage; but, on the contrary, no interest has been paid on said principal sum secured by said bond, and the said extension thereof, which has accrued due since the twenty-fourth day of August, A. D. 1876.

And your orator further avers that by the terms of said agreement of extension, if the same had been complied with, the said principal sum matured and became due on the twenty-fourth day of February, 1879, and that the whole of said principal sum, together with the interest thereon since the said twenty-fourth day of August, A. D. 1876, still remains wholly due and unpaid, and that the estate of your orator in the said lands and premises herein and in said mortgage described has become absolute at law.

And your orator further shows that in and by said mortgage it was covenanted and agreed that the said Cyrenius Beers and Mary Beers
16 would not at any time thereafter until said principal sum and the interest thereon should be fully paid suffer said premises, or any part thereof, to be sold for any tax or assessment whatsoever, nor do, or permit to be done, anything that would tend to impair the value thereof, or to weaken, diminish, or impair the security intended to be effected under and by virtue of said mortgage; and it was further provided that in the event that your orator, its successors or assigns, should expend any money either to save said premises or any part thereof from any sale or taxes or assessments, or to redeem the same from any such sale, or to protect the title or possession thereof, then all such money so expended should be and become a new and additional sum of money secured by said mortgage and should be due and payable and might be collected immediately or at any time thereafter, with interest thereon at the rate of ten per cent. per annum from the time of so paying the same.

17 And your orator further shows that after the making of said mortgage and the covenants aforesaid by the said Cyrenius Beers and Mary Beers large sums of money become due and payable for taxes and assessments which had been levied and assessed upon said premises according to law, and for the payment of which upon default made by said Cyrenius Beers and Mary Beers and the defendants herein said premises became and were liable to be sold; and your orator says that such default was made in the payment thereof.

And your orator further shows that on account of said default in the payment of said taxes and assessments it became necessary that your orator (or some one on its behalf) should, and it did, necessarily pay, lay out, and expend a large sum of money to protect said premises from sale and to redeem the same, for and on account of such taxes and assessments so levied and assessed as aforesaid.

And in like manner your orator has been compelled, by default
18 in the keeping of the covenants in said mortgage contained respecting insurance upon mortgaged premises, to pay and expend considerable sums of money to procure reasonable and necessary insurance upon said building.

And your orator further shows that the said Mary Beers departed this life on or about the eighth day of October, A. D. 1869, leaving a last will and testament, which was duly probated in the county court of Cook County, in the State of Illinois, in and by which the said Mary Beers devised and bequeathed all her real, personal, and mixed estate to the said Cyrenius Beers for life, and by the same instrument gave said estate to his heirs after his decease, thereby creating, as your orator is advised and believes, an estate in fee simple in all of her said estates in said Cyrenius Beers.

And your orator further shows that in and by said last will and testament the said Mary Beers imposed a trust on all of her estate so
19 coming to the hands of said Cyrenius Beers, that the said estates, real, personal, and mixed, should first be applied to the extinguishment of said bond and mortgage before said Cyrenius Beers or his heirs, or any other persons claiming through him or under said will, should have any beneficial use of said estates; and to that end expressly authorized and empowered said Cyrenius Beers to mortgage, charge, and encumber her estate and every part thereof, or to sell the same, in his discretion; for further particulars concerning which, and the powers and devises and trusts in said will contained, your orator refers to a certified copy of said will hereto attached and prayed to be taken as a part of this bill of complaint, the same being marked Exhibit A.

And your orator further shows that said Cyrenius Beers was duly appointed the executor under said last will and testament, and filed in said county court of Cook County an inventory of the estate of said Mary Beers, in and by which it appears that there came to the hands of said Cyrenius Beers, executor, as aforesaid, about the sum of twelve
20 thousand dollars, which said last-mentioned sum is shown by the final account of said executor, filed in said county court in the year A. D. 1876, to be still in the hands of said Cyrenius Beers at said last-mentioned date.

And your orator further shows, upon information and belief, and so charges the fact to be, that the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers did, by their writing filed in said county court, assent to said final account of said Cyrenius Beers as executor, and agree that the same was correct at that date, and to the approval of said account by said county court; and that said Cyrenius Beers was thereafter to hold said sum of about twelve thousand dollars as a trustee for the uses and trusts declared in the said will, and among others for the use and trust above stated.

And your orator further shows, on information and belief, that said Cyrenius Beers departed this life intestate on or about the 25th day of February, A. D. 1878, leaving him surviving as his only heirs the
21 the said defendants Mary C. Foster, Rissa J. Beers, and Charles G. Beers; that no administration has been taken out on his estate, and that he has never applied said twelve thousand dollars to the extinguishment of said bond and mortgage.

Your orator therefore charges that there is due from the estate of said Cyrenius Beers a trust fund amounting to about twelve thousand dollars, which is charged in whos'oever hands it may be with the trusts of said will, and in equity ought to be applied to the extinguishment of said bond and mortgage, and that said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, have received said fund, and hold the same to their

own use, and refuse to account for or discover the same to your orator, or to apply the same to the extinguishment and satisfaction of said bond and mortgage.

And your orator charges that the said Cyrenius Beers acquired, as aforesaid, an estate in fee-simple in all the estates of the said Mary Beers
22 by the said last will and testament of her, said Mary Beers, and that any interest that the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers may have in the said premises, mortgaged as aforesaid, they acquired by inheritance from the said Cyrenius Beers, their father.

Your orator further shows that in and by said indenture of mortgage it was provided that said Cyrenius Beers should and would, at all times thereafter until said principal sum of money and all arrearages of *of* interest thereon should be fully paid, keep all the buildings (out-houses excepted) then situated or that might thereafter be erected upon said premises fully insured from loss or damage by fire in some good and responsible insurance company or companies, in the fair insurable value of such buildings, and would legally and properly assign and deliver to your orator, its successors or assigns, all such policies of insurance taken out as aforesaid, and that your orator should hold such policies of insurance as col-
23 lateral and additional security for said principal sum of money and interest, and that your orator should have the right to receive and collect any money which might become payable on said policies and apply the same in accordance with the terms of said mortgage, but that your orator should not be required to collect said money so receivable, but might, at its election, reassign and deliver said policies to the said Cyrenius Beers; all of which will more fully appear by reference to said indenture of mortgage when produced.

Your orator further shows that policies of insurance were taken out on said buildings on said premises, and duly assigned to your orator, and that the buildings on said mortgaged premises were destroyed by fire in the month of October, A. D. 1871.

Your orator further shows that after such destruction by fire the said Cyrenius Beers applied to your orator and requested it, in case
24 your orator should be unwilling to reassign and deliver to him, said Cyrenius Beers, said policies of insurance, and allow him to collect the money due thereon, that your orator would collect the money due on said policies, and withhold the same from application on the said indebtedness, and deposit the same specially in a bank as a separate fund, and would cause the same to be paid over and delivered to said Cyrenius Beers whe' he, said Cyrenius Beers, should have restored or rebuilt the buildings on said lot, so as to re-establish your orator's security for said principal sum and interest by so erecting on said mortgaged premises and subject to said mortgage a suitable and substantial building.

And your orator further shows that said last-mentioned agreement was fully carried out and completed; and that your orator, upon satisfactory evidence furnished to your orator that said building had been so restored as aforesaid, paid over the said insurance money to him, said
25 Cyrenius Beers, according to said agreement and to the terms of said mortgage.

And your orator is informed and believes, and therefore charges the fact to be, that said Cyrenius Beers paid over said insurance money so re-

ceived by him as aforesaid, to the estate of said Mary Beers, and applied the same to the uses of said estate, and that said insurance money was eventually received by said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, to their own use and benefit as a part of said estate of the said Mary Beers.

Your orator further shows that said Mary C. Foster, Orrington C. Foster, her husband, Rissa J. Beers, and Charles G. Beers, have heretofore entered into possession of said mortgaged premises, and into the receipt and reception of the rents, issues, and profits thereof, and have ever since and still are in the receipt and enjoyment thereof; and your orator
26 charges that said rents, issues, and profits are being by them, or some of them, misappropriated and misapplied and diverted from the uses to which they should be applied under the trusts created by the will of said Mary Beers, deceased.

Your orator further shows that upon said mortgaged premises is now situated the three-story and basement brick building, number seventy-three South Water street, in the city of Chicago, and that the same is now in the actual occupancy of said Andrew Brown, one of the defendants herein named, as tenant of said Mary C. Foster, Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, or some *or some* one of them, under a demise thereof made to him subsequent and subject to the said mortgage to your orator; and your orator avers that it is informed and believes that the annual rental of said premises does not exceed the sum of two thousand dollars.

Your orator further shows that said mortgaged premises are a scanty and inadequate security for the amount of money due and owing to
27 your and charged upon the same as a security therefor, and that said Cyrenius Beers, obligor in the bond hereinbefore set forth, was at the time of his decease insolvent, and that his estate, so far as he left any at all, is wholly inadequate for the payment of his debts or any considerable part thereof; and that said mortgaged premises and the estate of said Mary Beers, as charged under and by her last will and testament aforesaid with the trust for the payment and discharge of the encumbrance thereon, constitute the only security of your orator for the recovery of its said indebtedness, and that upon a sale of said mortgaged premises, as hereinafter prayed for, the proceeds of such sale will, as your orator believes, be inadequate to satisfy said mortgage debt.

Your orator further shows that by the terms of said mortgage all the rents, issues, and profits of said premises were expressly mortgaged to your orator and pledged as security for said mortgage debt and the in-
28 terest thereon, and for the protection of said premises and the title thereof, against the liens of taxes and from tax sales; and further shows that under and by virtue of the trusts created by said will of said Mary Beers, the said rents and profits of said property were, as a part of her estate, charged with the burden of satisfying and removing the lien of encumbrances upon said estate, including the mortgage of your orator; and your orator is well entitled to have the same collected and applied to the uses aforesaid; but your orator avers that the same are now being collected and received by said Mary C. Foster, Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, or some or some one of them, and applied to their own use or to the use of some or some one of them, and that they have refused

and neglected to pay the taxes and assessments levied and assessed upon said premises, and that the same are now largely in arrears, and said premises have been sold for taxes as hereinafter stated, and they refuse and
29 have neglected to keep down the interest accruing on said mortgaged debt.

And your orator further shows that said mortgaged premises were suffered to be sold for the annual taxes levied thereon for the year A. D. 1876, which sale therefor is still outstanding and unredeemed from; and that said defendants and each of them refuse and have neglected to redeem the same therefrom; that the annual taxes levied upon said premises for the year A. D. 1877 are due, in arrears, and unpaid, and ought to be paid, but that there is no fund from which to pay the same unless said rents can be collected and appropriated for such purpose; and that the taxes of the year A. D. 1878 are now due and payable and remain still unpaid.

And your orator says that the rents and profits of said premises constitute the proper fund to pay the taxes upon said premises and to redeem said premises from tax sales, and that your orator is in danger of loss unless said rents can be secured and appropriated for such purpose.

30 And your orator shows that no proceedings at law have been had or taken to recover the debt secured by said bond and mortgage, or of any part thereof, or any of the interest due on the same.

And your orator further shows unto your honors that it has caused application frequently and in a friendly manner to be made to the said Cyrenius Beers and Mary Beers in their life-time, and to said defendants herein, and has requested them to pay the said principal sum of money and interest and the amount of taxes and assessments so paid as aforesaid to your orator, and to account for the moneys so received by them, or some of them, from the said Cyrenius Beers, or his estate, and held in trust by him as aforesaid, or else to release their equity of redem'tion in and to the said mortgaged premises; and your orator well hoped that such its reasonable request would have been complied with, as in justice it ought to have been, but now so it is the said defendants refuse so to do; and the
31 defendants hereinbefore named have, or claim to have, some interest in the said mortgaged premises, or some part thereof, either as subsequent purchasers, incumbrancers, judgment creditors, or otherwise, and to be entitled to redeem the same, but they refuse so to do.

And your orator charges that the interest in the said mortgaged premises which the said defendants have, if any, they, or either of them, have in said premises, or any part thereof, has accrued subsequent to the lien of the said mortgage to your orator, and is subordinate thereto, and that the said defendants ought either to pay what is due to your orator as aforesaid under the several covenants of the said bond and the execution thereof and the said mortgage, or to release their equity of redemption in said mortgaged premises, but they refuse so to do.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may full, true, and perfect answers make (not under oath, answers under oath
32 being hereby waived, according to the statute in such case made and provided) to all and singular the premises as fully and particularly as if the same were hereinafter repeated.

Your orator prays that an account may be taken under the direction of

the court of what is due and owing to your orator for principal money and interest on its said bond, and the extension thereof, and mortgage, and of all moneys due your orator under any of the covenants therein contained, and of all moneys so held in trust by Cyrenius Beers, as aforesaid, and which have come to the hands of said defendants or any of them, and that said defendants may be decreed to pay to your orator what may be found due to it on taking such account as aforesaid, together with the costs of this suit, by a short day to be appointed by this honorable court for that purpose, or in default thereof the said premises may be sold by and under the direction of this court according to the rules and practice of this court;

and the proceeds of such sale may be applied to the payment of the
33 amount due your orator as aforesaid, together with all costs and expenses; and that the said defendants, Mary C. Foster, Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, may set forth an account for the purposes aforesaid, of all and every sum and sums of money received by them or either of them, or by any person or persons by their or either of their order, for their or either of their use, for or in respect of any moneys so held in trust as aforesaid, at any time by said Cyrenius Beers under the last will and testament of said Mary Beers, and when and from whom all and every such sums were respectively received, and how the same have been respectively applied or disposed of, and that such trust moneys so received may be applied in satisfaction so far as may be of the indebtedness herein set forth to your orator, and that all the said defendants hereto, and all persons claiming under them subsequent to the commencement of this suit, may be foreclosed and barred from all equity of

rede'ption or claim of, in, and to the said mortgaged premises and
34 every part thereof, and that a receiver of said premises and of the rents, issues, and profits thereof may be appointed with the usual powers given to receivers in such cases, and also of all moneys or other property that were of the estate of said Mary Beers and subject to the trusts declared as aforesaid in and by her said last will and testament, and which have came to the hands of said Mary C. Foster, Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, or any of them, and that said defendants and each of them, their agents, and attorneys may be restrained by the order or injunction of this court from paying away or parting with any part of said trust property to any person other than such receiver; and that your orator may have such further and other relief in the premises as to your honors shall seem meet and the nature of this case may require.

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to
35 the said Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, Andrew Brown, Samuel Barnum, Stephen Barnum, and William Gribbon, thereby commanding them, and every of them, at a certain day, and under a certain pain, therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray, et cetera.

THE CONNECTICUT MUTUAL
LIFE-INSURANCE COMPANY,
By JUNIUS MULVEY, *Attorney.*

EDW'D S. ISHAM, *Of Counsel.*

36 STATE OF ILLINOIS,
County of Cook, ss:

Junius Mulvey being duly sworn, says on oath that he is the attorney of the Connecticut Mutual Life-Insurance Company, the complainant in the foregoing bill of complaint; that he has read the said bill of complaint, and knows the contents thereof; that he is personally familiar with most of the matters detailed in said bill, and that the allegations of said bill are true, according to the best of his knowledge, information, and belief.

And further says not.

JUNIUS MULVEY.

Subscribed and sworn to before me this fourth day of March, A. D. 1879.

[NOTARIAL SEAL.] WILLIAM L. GLASS,
Notary Public, Cook County, Illinois.

37 EXHIBIT A.

I, Mary Beers, wife of Cyrenius Beers, of Chicago, of lawful age, and sound mind, in view of the uncertainty of human life, do make, publish and declare this my last will and testament.

First. I order all of my debts to be paid, including the expenses of my funeral and last illness.

Second. I give and bequeath to my husband, Cyrenius Beers, all the estate, both real, personal, and mixed, of which I die seized or possessed, to be held by him in trust for the following uses, purposes, and trusts, and none other, that is to say, to receive the rents, income, and profits thereof during his life, with the remainder *of* my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, share and share alike to them, their heirs and assigns forever.

But, provided that said Cyrenius Beers may encumber the same by way of mortgage or trust-deed or otherwise, and renew the same for
38 the purpose of raising money to pay off any and all encumbrances now on said property, and which trust-deed or mortgage so made shall be as valid as though he held an absolute estate in said property.

But provided further, that the said Cyrenius Beers may, in his discretion, during his life, sell and dispose of any or all the real estate of which I may die seized or possessed, as though he held an absolute estate in the same, and out of the proceeds pay any of the encumbrances upon any of the property of which I may die seized and possessed, and the remainder over and above what may be required to pay the indebtedness upon said property, the same being now encumbered, to reinvest in such way as he may see proper, and from time to time to sell and reinvest, such reinvestment to continue to be held in trust, the same as the estate of which I may die possessed; that is to say, the said Cyrenius Beers only to
39 have the use during his life of said estate, with the right of sale and to encumber and reinvest, the remainder after his death to go to my children and their heirs forever.

Third. I hereby appoint said Cyrenius Beers executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided as such executor.

In witness whereof I have hereunto set my hand and seal this fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-nine.

MARY BEERS. [SEAL.]

The above instrument, consisting of three pages, was, at the date thereof, declared to us by Mary Beers, the testator therein mentioned, to be her last will and testament, and she at the same time acknowledged to us, and each of us, that she had signed and sealed the same, and
40 we thereupon, at her request, and in her presence, and in the presence of each other, signed our names thereto as attesting witnesses.

SAMUEL BEERS, [SEAL.]
GEORGE T. BEERS, [SEAL.]
Witnesses.

Proved in open court this 26th day of March, A. D. 1872.
M. R. M. WALLACE, *Judge.*

(Endorsed:) Will of Mary Beers. Filed Feb'y 3, 1872. George W. Wheeler, cl'k pro tem.

STATE OF ILLINOIS,
County of Cook:

In county court of Cook County, proven and admitted to probate March 26, 1872.

GEORGE W. WHEELER,
Cl'k pro tem.

41 STATE OF ILLINOIS,
Cook County, ss:

I, Seth F. Hanchett, clerk of the probate court of Cook County, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the last will and testament of Mary Beers, deceased, admitted to probate by the county court of Cook County, March 26, A. D. 1872. All of which appears from the records and files of my office.

In witness whereof I have hereunto set my hand and affixed the seal of said probate court at my office, in the city of Chicago, in said county this fourth day of March, A. D. 1879.

[SEAL.]

SETH F. HANCHETT,
Clerk of the Probate Court.

(Endorsed:) Filed M'ch 5, 1879. W. H: Bradley, cl'k.

42 And on the same day, to wit, the 5th day of March, A. D. 1879, a writ of subpœna issued out of said clerk's office to said defendants in said entitled cause, which said writ with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, Andrew Brown, Samuel Barnum, and Stephen Barnum, impleaded with William Gribbon, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of April next, to answer the bill of complaint of the Connecticut Mutual Life-Insurance Company this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the
43 Supreme Court of the United States of America, at Chicago aforesaid, this 5th day of March, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the 103rd.

[SEAL.] WM. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Circuit court of the United States of America, northern district of Illinois, ss.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
CHARLES G. BEERS, RISSA J. BEERS, MARY C. Foster, Orrington C. Foster, Andrew Brown, et al. } In chancery.

To Charles G. Beers, Rissa J. Beers, Mary C. Foster, Andrew Brown, Orrington C. Foster:

44 Take notice that the complainant will move this honorable court on the 31st day of March, A. D. 1879, or as soon thereafter as counsel can be heard, that a writ of injunction issue against the within and above-named defendants, and that a receiver be appointed in accordance with the prayer of the bill herein.

Yours, etc.,

JUNIUS MULVEY,
Comp'ts Solicitor.

Dated this 5th day of March, A. D. 1879.

I have served the within writ with notice of motion for appointment of

receiver to Charles G. Beers, Rissa J. Beers, Mary C. Foster, Andrew Brown, and Orrington C. Foster, within my district in the following manner, to wit:

Upon Rissa J. Beers therein named on the 6 day of March, A. D. 1879; also upon Andrew Brown herein named, on the 11 day of March, A. D. 1879; also upon Samuel Barnum therein named, on the 6 day of March, A. D. 1879, by personally delivering to each of them a true copy of the same on the aforesaid days. I also served the same upon the following-named defendants, not having been able to find them to serve personally, by leaving a true copy for each of them at their usual places of abode with an adult person and a member of their respective families, to wit:

Upon Charles G. Beers on the 6 day of March, A. D. 1879, with Rissa J. Beers; also upon Masy C. Foster on the 6 day of March, A. D.
45 1879, with Rissa J. Beers; also upon Orrington C. Foster on the 6 day of March, A. D. 1879, with Rissa J. Beers. I did not serve Stephen Barnum, the other defendant, having been unable to find either him or that he had any residence within my district.

J. S. HILDRUP,
U. S. Marshal,
By J. STILLWELL,
Deputy.

(Endorsed:) Filed M'ch 20th, A. D. 1879. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 7th day of April, A. D. 1879, said defendants, Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, by their solicitors filed, in said clerk's office their appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance of Charles G. Beers, et al.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States within and for said district.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company *v.* CHARLES G. BEERS, MARY C. FOSTER, RISSA J. Beers, Orrington C. Foster, and Andrew Brown, et al., defendants.	In chancery.

46 We hereby enter the appearance of said defendants, Charles J. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, in the above suit.

HERBERT, QUICK, & MILLER,
Solicitors for said Defendants above named.

(Endorsed:) Filed Apr. 7, 1879. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 5th day of May, A. D. 1879, said defendants

Andrew Brown and Orrington C. Foster, by their solicitors, filed in said clerk's office their plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea of Andrew Brown and Orrington C. Foster.

In the circuit court of the United States for the northern district of Illinois. In chancery.

The joint and several plea of Orrington C. Foster and Andrew Brown, two of the defendants, to the bill of complaint of the Connecticut Mutual Life-Insurance Company, complainant:

These defendants, by protestation not confessing or acknowledging all or any of the matters or things in said complainant's said bill contained to be true in such manner and form as the same are therein set forth and alleged, do plead in bar to said bill, and for plea say that they are
47 informed and believe, and, upon their information and belief, do aver that on or about the twenty-fourth day of February, in the year 1869, Mary Beers, in said bill of complaint mentioned, was the owner and well seized in her own right of the lands and premises in said bill of complaint mentioned and described, and that on or about the day and year last mentioned, and while she, the said Mary Beers, was so the owner and well seized and possessed of the said premises in fee-simple in her own right she, the said Mary Beers, together with the said Cyrenius Beers, her husband, executed, acknowledged, and delivered the said indenture of mortgage of said premises which is mentioned in said bill of complaint, and thereby sought to be foreclosed to secure the payment to said complainant of the said indebtedness of twenty thousand dollars of said Cyrenius Beers in said bill of complaint also mentioned, on the twenty-fourth day of February, in the year 1874, and the interest thereon at and after the rate of eight per cent. per annum, in said bill of complaint also mentioned, according to the terms and to the true intent and meaning of the said bond or obligation in writing of said Cyrenius Beers to said complainant, bearing date the twenty-fourth day of February, in the year 1869, in said bill of complaint also mentioned, and for no other purpose or object, and upon no other consideration whatever, all which the said complainant at and
48 before the execution and delivery of said mortgage well knew, and the said indebtedness was the indebtedness of said Cyrenius Beers, and was not nor was any part or portion thereof at any time the indebtedness of said Mary Beers, nor was she, the said Mary Beers, at any time personally liable for the same or for any part thereof.

And these defendants are further informed and believe, and upon their information and belief do aver, that said indenture of mortgage, among other things therein contained, recited in substance that the title to said premises was, at the execution and delivery thereof, in her, the said Mary Beers.

And these defendants are further informed and believe, and do likewise aver, that from and after the execution and delivery of said indenture of mortgage as aforesaid, thence until and at the time of the death of her, the said Mary Beers, she, the said Mary Beers, continued to be, and was, and departed this life the sole owner and well seised and possessed in fee sim-

ple in her own right of said premises, subject only to said indenture of mortgage as aforesaid.

And these defendants do likewise aver that the said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, are the children of said Mary Beers, and are the persons with those names respectively mentioned in the said last will and testament of said Mary Beers in said bill
49 of complaint mentioned.

And these defendants do likewise aver that said Cyrenius Beers paid to said complainant the interest which accrued on the said indebtedness of twenty thousand dollars from said twenty-fourth day of February, in the year 1869, until the twenty-fourth day of February, in the year 1874, and until the maturity of the said indebtedness, according to the terms and the true interest and meaning of said bond, at the rate of eight per cent. per annum.

And these defendants do likewise aver that on the twenty-fourth day of February, in the year 1874, when said indebtedness had fully matured according to the terms and the true intent and meaning of said bond, said complainant did, at the request of said Cyrenius Beers, and without the consent or authority of said defendants, or of any or either of them, extend and postpone the time of payment of said indebtedness of said Cyrenius Beers; and for that purpose the said Cyrenius Beers and said complainant then and there, at said city of Chicago, made and entered into a certain agreement in writing, without the authority or consent of said defendants, or any or either of them, which said agreement was in substance as follows, that is to say:

Memorandum of agreement made and entered into this twenty-fourth day of February, A. D. 1874, by and between the Connecticut Mu-
50 tual Life-Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, and State of Connecticut, of the one part, and Cyrenius Beers, of the city of Chicago, in the county of Cook, and State of Illinois, of the other part.

Whereas the said Cyrenius Beers is justly indebted unto the said The Connecticut Mutual Life-Insurance Company in the sum of twenty thousand ($20,000) dollars, secured to be paid by the certain bond or obligation in writing of the said Cyrenius Beers, bearing date at Chicago aforesaid, twenty-fourth day of February, A. D. 1869, in the penal sum of forty thousand ($40,000) dollars, conditioned for the payment unto the said company, its successors or assigns, of the principal sum of twenty thousand ($20,000) dollars on the twenty-fourth day of February, A. D. 1874, with interest thereon at the rate of eight per centum per annum, payable half yearly; and whereas the said principal sum of said bond is still wholly unpaid and the said Cyrenius Beers, party of the second part hereto, hath applied to said The Connecticut Mutual Life-Insurance Company to extend the time for the payment of said principal sum; and whereas the said Cyrenius Beers and Mary, his wife, executed and delivered their certain indenture of mortgage to said company, bearing even date with said bonds to secure the payment thereof, which mortgage was duly
51 recorded in the recorder's office of said Cook County: Now, this memorandum witnesseth, that the said The Connecticut Mutual

Life-Insurance Company in consideration of the covenants and agreements on the part of the said Cyrenius Beers hereinafter contained, the prompt and faithful performance whereof is a condition precedent hereto, and time being the essence of this contract, doth hereby extend and postpone the time of payment of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned until the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, interest to be paid thereon at and after the rate of nine per centum per annum, half yearly, in the same manner and at the place or places in the condition of said bond mentioned; and the said Cyrenius Beers, in consideration of such extension of the time of payment of said principal sum, doth hereby covenant, promise, and agree to and with said The Connecticut Mutual Life-Insurance Company, its successors and assigns, that he will well and truly pay the said The Connecticut Mutual Life-Insurance Company, its successors, and assigns said principal sum of twenty thousand ($20,000) dollars on the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, at the place in the condition of said bond mentioned, and also interest thereon at the rate of nine per centum
52 per annum half-yearly, to wit, on the twenty-fourth day of each of the months of August and February, which will be in each and every year during such extended time of payment, according to the tenor and effect of the ten (10) coupons or due-bills assigned by said Cyrenius Beers, bearing even date and given herewith, it being expressly understood and agreed by and between the parties hereto that in the event of a failure to pay either or any of said coupons at maturity, then, at the election of said The Connecticut Mutual Life Insurance Company, its successors or assigns, the whole of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all arrearages of interest thereon, in the same manner as if said extension had never been granted. It is further expressly understood by and between the parties hereto that nothing herein contained shall operate to discharge or release the said Cyrenius Beers, his heirs, executors, or administrators from their liabilities upon said bond, but it is expressly undersood that this instrument is to be taken as collateral and additional security for the payment of said bond. It is also expressly understood and agreed by and between the parties hereto that in the event of
53 failure on the part of the said Cyrenius Beers, his heirs, legal representatives, and assigns to fulfil, keep, and promptly perform, as well in spirit as in letter, the covenants in the said mortgage contained, given by said Cyrenius Beers to said company, then at the election of said The Connecticut Mutual Life Insurance Company, its successors or assigns, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything herein before contained to the contrary notwithstanding.

In witness whereof the said parties to these presents have hereto set their hands and seals the day and year first-above written.

CYRENIUS BEERS. [SEAL.]

Which memorandum of agreement was signed and sealed by the said Cyrenius Beers, and, hereupon then and there delivered to and accepted by the said complainant at Chicago aforesaid, and which is the same memorandum of agreement in the said bill of complaint in that behalf mentioned.

And these defendants likewise aver that in pursuance of said memorandum of agreement of February 24th, 1874, the said Cyrenius Beers did, on said twenty-fourth day of February, in the year 1874, at the city of Chicago aforesaid, make, execute, and deliver to said com-
54 plainant, with said memorandum of agreement last mentioned, his ten coupons or due-bills signed by said Cyrenius Beers, and bearing even date with said memorandum of agreement, one of which coupons or due-bills was in substance as follows:

$900. Due The Connecticut Mutual Life-Insurance Company or order nine hundred dollars on the twenty-fourth day of August, A. D. 1874, payable at such place in the city of New York, in the State of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment then at the office of said The Connecticut Mutual Life-Insurance Company in the city of Hartford, in the State of Connecticut, being for the payment of the half yearly interest due that day on my bond to said The Connecticut Mutual Life-Insurance Company of date February 24th, 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has been conditionally extended to the twenty-fourth day of February, A. D. 1879.

Chicago, February 24th, 1874.

CYRENIUS BEERS.

And the other nine of which coupons or due-bills were the same in amount and in terms and tenor except as to the day and year on which the amounts thereof were respectively due as the coupon or due-bill last-above mentioned, and the amounts of said other nine coupons or due-bills
55 were by the terms thereof respectively due, one on the twenty-fourth day of February, and on the twenty-fourth day of August, in each of the years 1875, 1876, 1877, and 1878, and on the twenty-fourth day of February, in the year 1879, and which said coupons or due-bills are the same mentioned in the said memorandum of agreement of February 24th, 1874, for an extension herein-above mentioned, and were given by said Cyrenius Beers to secure the interest on said indebtedness to said complainant at the rate of nine per centum per annum during said extended time for the payment of said indebtedness as provided in said memorandum of agreement.

And these defendants do likewise aver that the consideration on which the said complainant did make the said agreement for an extension of time of payment of said indebtedness of said Cyrenius Beers as aforesaid was the covenants and agreements on the part of the said Cyrenius Beers in said memorandum of agreement contained, and among others the covenant and agreement on the part of said Cyrenius Beers in said memorandum of agreement mentioned to pay interest on the said indebtedness of twenty thousand dollars, at the rate of nine per centum per annum half yearly, to wit, on the twenty-fourth day of the months of August and February in each and every year during such extended time of payment, ac-

56 cording to the tenor and effect of the ten coupons or due-bills aforesaid.

And these defendants do likewise aver that said Cyrenius Beers did pay to said complainant the interest on said indebtedness of twenty thousand dollars, at said rate of nine per centum per annum from the twenty-fourth day of February, in the year 1874, during such extended time of payment, up to and including the said interest due and payable on the twenty-fourth day of August, in the year 1876, according to the terms of said memorandum of agreement and the tenor and effect of the said coupons or due-bills given therefor as aforesaid, and took up said coupons or due-bills which by the terms thereof were due and payable on or before said twenty-fourth day of August, in the year 1876.

And these defendants say that by reason of the facts aforesaid the said premises and the estate of the said Mary Beers, deceased, was by the said complainant thereby released and discharged of and from the said supposed mortgage, and of and from all supposed lien, charge, incumbrance, and trust in the said bill of complaint alleged or charged for the security or payment of the said alleged indebtedness.

Wherefore these defendants do aver and plead the several matters
57 aforesaid in bar to the said complainant's said bill, and pray the judgment of this honorable court whether he should be compelled to make any further answer to the said bill, and pray to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ANDREW BROWN.
O. C. FOSTER.

HERBERT, QUICK and MILLER,
Solicitors for said Defendants & of Counsel.

STATE OF ILLINOIS,
Cook County, ss:

Orrington C. Foster and Andrew Brown, of the city of Chicago, in said county, being duly sworn, each for himself says that he has heard read the foregoing plea by him signed, and that so much of said plea as relates to his own acts is true, and that so much thereof as relates to the acts of others he believes to be true, and that the same is not interposed for delay.

O. C. FOSTER.
ANDREW BROWN.

Subscribed and sworn to before me this fifth day of May, A. D. 1879.
[SEAL.] JOHN S. MILLER,
Notary Public.

I certify that in my opinion the foregoing plea is well founded in point of law.

JOHN S. MILLER,
Of Counsel for said Defendant.

(Endorsed:) Filed May 5, 1879. Wm. H. Bradley, clerk.

58 And on the same day, to wit, the 5th day of May, A. D. 1879, said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, by their solicitors, filed in said clerk's office their plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea of Mary C. Foster et al.

In the United States circuit court for the northern district of Illinois. In chancery.

The joint and several plea of Mary C. Foster, Rissa J. Beers, and Charles G. Beers, defendants, to the bill of complaint of the Connecticut Mutual Life-Insurance Company, complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's said bill mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead in bar to the said bill, and for plea say that heretofore, on or about the twenty-fourth day of February, in the year 1869, Mary Beers, now deceased, but who was then in full life, was the sole owner and well seized in fee simple in her own right of the premises in said bill of complaint of the Connecticut Mutual Life-Insurance Company, and here described as follows: All that certain lot or piece or parcel of land situate, lying, and being in the city of Chicago, in the county of Cook and State of Illinois, known and described as being a part
59 of lots number four (4) and five (5), in block number eight (8), in Fort Dearborn addition to Chicago, butted and bounded as follows: commencing at a point on the north line of said lots fourteen (14) feet east from the northwest corner of said lot four (4), running thence east twenty-seven (27) feet; thence south one hundred and forty (140) feet to the alley on the south line of said lots; thence west along such south line twenty-seven (27) feet; thence north one hundred and forty (140) feet to place of beginning, being the west eighteen (18) feet and four (4) inches of said lot five (5) and the east eight (8) feet and eight inches of said lot four; and that on or about the said twenty-fourth day of February, in the year 1869, and while the said Mary Beers was so well-seised and possessed of the said premises in fee simple in her own right as aforesaid she, the said Mary Beers, executed, acknowledged, and delivered the said indenture of mortgage of the said premises above and in the said bill of complaint described, which is in the said bill of complaint mentioned, and thereby sought to be foreclosed to secure the payment of the said indebtedness of twenty thousand dollars of said Cyrenius Beers to the said complainant in said bill of complaint mentioned, on the twenty-fourth day of February, in the year 1874, and the interest thereon, at and after the rate of eight per cent. per annum, in said bill of complaint also mentioned, according to the terms and to the true intent and meaning of the said bond or
60 obligation in writing of the said Cyrenius Beers to the said complainant, bearing date the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, in said bill of complaint also mentioned, and for no other purpose or object and upon no other consideration whatever; all which the said complainant, at and before the execution and delivery of said mortgage, well knew, and the said

indebtedness was the indebtedness of the said Cyrenius Beers and was not nor was any part or portion thereof at any time the indetedness of said Mary Beers, nor was she, the said Mary Beers, at any time personally liable for the same or for any part thereof.

And these defendants likewise aver that the said indenture of mortgage, among other things therein contained, recited in substance that the title to the said premises was at the execution and delivery thereof in her the said Mary Beers.

And these defendants likewise aver that from and after the execution and delivery of the said indenture of mortgage as aforesaid, thence until the decease of her the said Mary Beers, she, the said Mary Beers, continued to be and was the sole owner and well seised and possessed in fee simple in her own right of the said premises, subject only to the said indenture of mortgage as aforesaid.

And these defendants likewise aver that the said Mary Beers, being so seized and possessed in her own right of the said premises in fee
61 simple as aforesaid, and being of sound mind, memory, and understanding, duly made and published her last will and testament in writing, bearing date the fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-nine, signed and executed and attested in due form of law, in and by which she did devise and bequeath to her husband, the said Cyrenius Beers, all the estate, both real, personal, and mixed of which she died seised, or possessed, to be held by him in trust for the following uses, purposes, and trusts, and none other; that is to say, receive the rents, income, and profits thereof during his life, with the remainder to the children of said Mary Beers, the said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, share and share alike, to them, their heirs, and assigns forever. But provided that the said Cyrenius Beers might encumber the same by way of mortgage or trust-deed or otherwise, and renew the same for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust-deed or mortgage so made should be as valid as though he held an absolute estate in said property. But, provided further, that the said Cyrenius Beers might in his discretion during his life sell and dispose of any or all the real estate of which she, the said Mary Beers, might die seised, or possessed, as though he held an absolute estate in the same, and out of the proceeds pay any of the incumbrances upon any of the property of which she might die seised,
62 and possessed and the remainder over and above what might be required to pay the said indebtedness upon said property, the same being then incumbered, to reinvest in such way as he, the said Cyrenius Beers, might see proper, and from time to time to sell and reinvest, such reinvestment to continue to be held in trust the same as the estate of which the said testatrix might die possessed, that is to say, the said Cyrenius Beers only to have the use during his life of said estate with the right of sale, and to incumber and reinvest, the remainder after his death to go to her, the said Mary Beers and children above named, and their heirs forever, which is the same will in the said bill of complaint mentioned; and the said Mary Beers, being so seised and possessed of said premises as aforesaid, departed this life on the eighth day of October, in the year 1869, at the city of Chicago, in the county of Cook, and State of Illinois, with-

out having altered or revoked her said will, and the said will was afterwards duly admitted to probate in the county court of said county of Cook, as in said bill of complaint in that behalf stated.

And these defendants further aver that the said Cyrenius Beers paid to the said complainant the interest which accrued on the said indebtedness of twenty thousand dollars from said twenty-fourth day of February, in the year 1869, until and including the twenty-fourth day of February,
63 in the year 1874, at the rate of eight per centum per annum, according to the terms and to the tenor and effect of said bond and of said coupons securing said interest in said bill of complaint mentioned.

And these defendants likewise aver that on the twenty-fourth day of February, in the year 1874, and when said indebtedness had fully matured according to the true intent and meaning of said bond, the said Cyrenius Beers requested the said complainant to give him further time for the payment of said indebtedness, and the said complainant thereupon consented so to do, and thereupon then and there, at said city of Chicago, the said Cyrenius Beers and said complainant for that purpose made and entered into a certain agreement in writing, without the consent or authority of these defendants or any creditor of them, which said agreement for an extension was in substance as follows, that is to say:

Memorandum of agreement made and entered into this twenty-fourth day of February, A. D. 1874, by and between the Connecticut Mutual Life-Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, and State of Connecticut, of the one part, and Cyrenius Beers, of the city of Chicago, in the county of Cook, and State of Illinois, of the other part.

Whereas the said Cyrenius Beers is justly indebted unto the said
64 The Connecticut Mutual Life-Insurance Company in the sum of twenty thousand ($20,000) dollars, secured to be paid by the certain bond or obligation in writing of the said Cyrenius Beers, bearing date at Chicago aforesaid the twenty-fourth day of February, A. D. 1869, in the penal sum of forty thousand ($40,000) dollars, conditioned for the payment unto the said company, its successors or assigns, of the principal sum of twenty thousand ($20,000) dollars, on the twenty-fourth day of February, A. D. 1874, with interest thereon at the rate of eight per centum per annum, payable half yearly; and whereas the said principal sum of said bond is still wholly unpaid, and the said Cyrenius Beers, party of the second part hereto, hath applied to said The Connecticut Mutual Life-Insurance Company to extend the time for the payment of said principal sum, and whereas the said Cyrenius Beers and Mary, his wife, executed and delivered their certain indenture of mortgage to said company, bearing even date with said bond, to secure the payment thereof, which said mortgage was duly recorded in the recorder's office of said Cook County:

Now, this memorandum witnesseth that the said The Connecticut Mutual Life-Insurance Company, in consideration of the covenants and agreements on the part of the said Cyrenius Beers, hereinafter contained, the prompt and faithful performance whereof is a condition precedent hereto, and time being the essence of this contract, doth hereby extend and
65 postpone the time of payment of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond men-

tioned until the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, interest to be paid thereon at and after the rate of nine per centum per annum, half yearly, in the same manner and at the place or places in the condition of said bond mentioned.

And the said Cyrenius Beers, in consideration of such extension of the time of payment of said principal sum doth hereby covenant, promise, and agree to and with said The Connecticut Mutual Life-Insurance Company, its successors and assigns, that he will well and truly pay the said The Connecticut Mutual Life-Insurance Company, its successors and assigns, said principal sum of twenty thousand ($20,000) dollars on the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, at the place in the condition of said bond mentioned, and also interest thereon at the rate of nine per centum per annum, half yearly, to wit, on the twenty-fourth day of each of the months of August and February, which will be in each and every year during such extended time of payment, according to the tenor and effect of the ten (10) coupons or due-bills signed by said Cyrenius Beers, bearing even date and given herewith. It being expressly understood and agreed by and between the parties hereto that in the event of a failure to
66 pay either or any of said coupons at maturity, then at the election of said The Connecticut Mutual Life-Insurance Company, its successors or assigns, the whole of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned shall thereupon at once become due and payable and may be collected without notice, together with all arrearages of interest thereon, in the same manner as if said extension had never been granted.

It is further expressly understood by and between the parties hereto that nothing herein contained shall operate to discharge or release the said Cyrenius Beers, his heirs, executors, or administrators from their liabilities upon said bond, but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond.

It is also expressly understood and agreed by and between the parties hereto that in the event of a failure on the part of the said Cyrenius Beers, his heirs, legal representatives, and assigns to fulfil, keep and promptly perform as well in spirit as in letter the covenants in the said mortgage contained, given by said Cyrenius Beers to said company, then at the election of said The Connecticut Mutual Life-Insurance Company, its successors or assigns, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may
67 be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything hereinbefore contained to the contrary notwithstanding.

In witness whereof the said parties to these presents have hereto set their hands and seals the day and year first-above written.

CYRENIUS BEERS. [SEAL.]

Which memorandum of agreement was signed and sealed by the said Cyrenius Beers, and thereupon then and there delivered to and accepted by the said complainant at Chicago aforesaid, and which is the same memorandum of agreement in the said bill of complaint in that behalf mentioned, and the same contains the only agreement for an extension of

said indebtedness or in regard thereto between the said Cyrenius Beers and the said complainant.

And these defendants likewise aver that in pursuance of the said memorandum of agreement between the said Cyrenius Beers and the said complainant of February 24th, A. D. 1874, the said Cyrenius Beers did, on said twenty-fourth day of February, in the year 1874, at the city of Chicago aforesaid, make, execute, and deliver to said complainant with said memorandum of agreement last herein mentioned his ten coupons or due-bills signed by said Cyrenius Beers, and bearing even date with said memorandum of agreement, one of which said coupons was in substance as follows:

68 $900. Due The Connecticut Mutual Life-Insurance Company or order, nine hundred dollars on the twenty-fourth day of August, A. D. 1874, payable at such place in the city of New York, in the State of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment then at the office of said The Connecticut Mutual Life-Insurance Company, in the city of Hartford, in the State of Connecticut, being for the payment of the half-yearly interest due that day on my bond to said The Connecticut Mutual Life-Insurance Company of date February 24th, 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has been conditionally extended to the twenty-fourth day of February, A. D. 1879.

Chicago, February 24th, 1874.

CYRENIUS BEERS.

And the other nine of which coupons or due-bills were the same in amount and in terms and tenor, except as to the day and year on which the amounts thereof were respectively due, as the coupon or due-bill last-above mentioned, and the amounts of said other nine coupons or due-bills were by the terms thereof respectively due, one on the twenty-fourth day of February and on the twenty-fourth day of August in each of the years 1875, 1876, 1877, and 1878, and on the twenty-fourth day of February, in the year 1879, and which said coupons or due-bills are the same
69 mentioned in the said memorandum of agreement of February 24th, 1874, herein-above mentioned, and were given by the said Cyrenius Beers to secure the interest on said indebtedness to said complainant, at the rate of nine per centum per annum during said extended time for the payment of said indebtedness, as provided in said memorandum of agreement.

And these defendants further aver that the consideration on which the said complainant did make the said agreement for an extension of time of payment of said indebtedness of said Cyrenius Beers as aforesaid was the covenants and agreements on the part of the said Cyrenius Beers in said memorandum of agreement contained, and, among others, the covenant and agreement on the part of said Cyrenius Beers in said memorandum of agreement to pay interest on the said indebtedness of twenty thousand dollars, at the rate of nine per centum per annum, half-yearly, to wit, on the twenty-fourth day of each of the months of August and February in each and every year during such extended time of payment, according to the tenor and effect of the ten coupons or due-bills aforesaid.

And these defendants further aver that the said Cyrenius Beers did pay

to the said complainant the interest on said indebtedness of twenty thousand dollars at said rate of nine per centum per annum, from the twenty-
fourth day of February, in the year 1874, during such extended
70 time of payment, up to and including the said interest due and
payable on the twenty-fourth day of August, in the year 1876, according to the terms of said memorandum of agreement and the tenor and effect of the said coupons or due-bills given therefor as aforesaid, and took up the said coupons or due-bills which by the terms thereof were due and payable on or before said twenty-fourth day of August, in the year 1876.

And these defendants say that by reason of the facts aforesaid the said premises and the estate of the said Mary Beers, deceased, was by the said complainant thereby released and discharged of and from the said supposed mortgage, and of and from all supposed lien, claim, charge, incumbrance, and trust in the said bill of complaint alleged or charged for the security or payment of the said alleged indebtedness.

Wherefore these defendants do aver and plead the several matters aforesaid in bar to the said complainant's said bill, and pray the judgment of this honorable court whether they should be compelled to make any further answer to the said bill, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

MARY C. FOSTER.
RISSA J. BEERS.
CHARLES G. BEERS.

HERBERT, QUICK and MILLER,
Solicitors for said Defendants and of Counsel.

71 STATE OF ILLINOIS,
Cook County, ss:

Mary C. Foster, Rissa J. Beers, and Charles G. Beers, each for herself and himself, being duly sworn, say that they are defendants in the above plea, and that they heard the same read and know the contents thereof; and that the said plea is true in point of fact, and that the same is not interposed for delay.

MARY C. FOSTER.
RISSA J. BEERS.
CHARLES G. BEERS.

Subscribed and sworn to before me on this 31st day of March, A. D. 1879.

[SEAL.] WILLIAM W. GURLEY,
Notary Public.

I certify that, in my opinion, the foregoing plea is well founded in point of law.

JOHN S. MILLER,
Of Counsel for said Defendants.

(Endorsed:) Filed May 5, 1879. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 11th day of June, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Hon.

John M. Harlan, one of the justices of the Supreme Court of the United States, is the following, to wit:

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
72 CHARLES G. BEERS ET AL. } In chancery.

On motion, this cause is set down for hearing on the sufficiency of the pleas herein.

Afterwards, to wit, on the 16th day of June, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following, to wit:

CONNECTICUT MUTUAL LIFE-INSURANCE COMpany
v.
CHARLES G. BEERS ET AL. } In chancery.

On motion of Herbert, Quick and Miller, solicitors, leave is given Mary C. Foster and Rissa J. Beers to file a cross-bill herein.

Afterwards, to wit, on the 16th day of June, A. D. 1879, said Mary C. Foster and Rissa J. Beers, by their solicitors, filed in said clerk's office their cross-bill in said entitled cause; which said cross-bill is in the words and figures following, to wit:

Cross-bill of Mary C. Foster and Rissa J. Beers.

To the judges of the circuit court of the United States for the northern district of Illinois:

Your oratrixes, Mary C. Foster and Rissa J. Beers, of the city
73 of Chicago, in the State and northern district of Illinois, and citizens of said State of Illinois, bring this their bill of complaint against the Connecticut Mutual Life-Insurance Company, a corporation created and existing under and by virtue of the laws of the State of Connecticut, having its principal office at the city of Hartford, in said State of Connecticut, and which is a citizen of said State of Connecticut, Andrew Brown, of Chicago, who is a citizen of said State of Illinois.

And thereupon your oratrixes and orator complain and say that heretofore on or about the fifth day of March, in the year 1879, the Connecticut Mutual Life-Insurance Company aforesaid, filed its bill of complaint in this honorable court against your oratrixes and orator and the said Andrew Brown, Samuel Barnum, Stephen Barnum, and William Gribbon, thereby stating and charging such matters as are therein contained, and praying in substance that an account might be taken under the direction of this court of what is due and owing to said original complainant, the Connecticut Mutual Life-Insurance Company, on the pretended bond and the extension thereof, and the pretended mortgage in said original bill of complaint of the Connecticut Mutual Life-Insurance Company mentioned,

and of moneys held in trust by Cyrenius Beers for the payment of said pretended bond and mortgage as charged in said original bill, and which are therein charged to have come to the hands of the defendants thereto or some of them, and that said moneys might be applied in
74 payment of said indebtedness, and that said defendants thereto might be decreed to pay what might be found due said original complainant on taking such account, together with the costs of said suit, by a short day to be fixed by this honorable court, or in default thereof that the premises in said original bill of complaint, described as follows: all that certain lot, piece, or parcel of land situate, lying, and being in the city of Chicago, in the county of Cook, and State of Illinois, known and described as being a part of lots number four (4) and five (5) in block number eight (8) in Fort Dearborn addition to Chicago, butted and bounded as follows, to wit: commencing at a point on the north line of said lots fourteen (14) feet east from the northwest corner of said lot four (4), running thence east twenty-seven (27) feet; thence south one hundred and forty (140) feet to the alley on the south line of said lots; thence west along such south line twenty-seven (27) feet; thence north one hundred and forty (140) feet to the place of beginning, being the west eighteen (18) feet and four (4) inches of said lot five (5) and the east eight (8) feet and eight inches of said lot four, might be sold by and under the direction of this court according to the rules and practice of this court, and the proceeds of such sale might be applied to the payment of the amount due said original complainant, together with all costs and expenses, and that
75 the defendants thereto and all persons claiming under them subsequent to the commencement of said suit might be foreclosed and barred from all equity of redemption or claim of, in, and to the said mortgaged premises, and every part thereof, and for a receiver of the said premises and of the rents, issues, and profits thereof, and also of all moneys or other property that were of the estate of said Mary Beers and subject to the trusts alleged by said original complainant in said bill to be declared in and by the last will and testament of said Mary Beers, and which have come to the hands of said Mary C. Foster, Orrington C. Foster, Rissa, J. Beers, and Charles G. Beers, or any of them, and that the defendants thereto, their agents and attorneys, might be restrained by injunction from paying away or parting with any part of said trust property to any person other than such receiver, and for such other relief as to the court should seem meet, to which bill your oratrixes and said Charles G. Beers, Orrington C. Foster, and Andrew Brown pleaded in bar, upon which bill no further proceedings have been had, but which is still pending and undetermined in this honorable court on the chancery side thereof and before your honor.

And your oratrixes further show unto your honor that heretofore, on or about the twenty-fourth day of February, in the year of our Lord 1869,
76 Mary Beers was, and for a long time theretofore had been, the owner and well seised in her own right of the premises herein-above described in fee simple absolute, as is alleged and stated substantially in said original bill of complaint of the Connecticut Mutual Life Insurance Company; and that on or about the day and year last named, and while the said Mary Beers was so the owner, and seized and possessed of said premises as aforesaid, Cyrenius Beers, who was the husband of said

Mary Beers, then being or pretending to be indebted to the said Connecticut Mutual Life-Insurance Company in the sum of twenty thousand dollars, and having in order to secure or evidence the said indebtedness with interest thereon, at the rate of eight per cent. per annum, payable half-yearly, executed and delivered to the said Connecticut Mutual Life-Insurance Company his certain bond or obligation in writing, sealed with his seal and bearing date at Chicago the said 24th day of February, 1869, in effect for the payment to the said Connecticut Mutual Life-Insurance Company of said principal sum of 20,000 dollars, on the 24th day of February, 1874, with interest for the same, to be computed from the day of the date thereof, at and after the rate of eight per centum per annum, which said interest should be paid half-yearly, and was specified in and secured by ten coupons all substantially as alleged in said original bill of complaint; the said Mary Beers who was then well seised in her own right of the
77 said premises above and in said original bill of complaint described, in fee simple absolute as aforesaid, for the purpose of further securing the payment to the Connecticut Mutual Life-Insurance Company aforesaid of the said alleged indebtedness of 20,000 dollars of said Cyrenius Beers, and interest thereon as aforesaid, according to the terms of said bond or obligation, together with said Cyrenius Beers, her husband, and for no other purpose whatsoever, executed and delivered their certain mortgage, under their respective hands and seals, bearing date the said 24th day of February, 1869, to the Connecticut Mutual Life-Insurance Company aforesaid, of the premises herein-before described, which said mortgage was acknowledged and recorded in the recorder's office of said county of Cook, February 27th, 1869, in book 95 of mortgages, at page 212, and is the same indenture of mortgage in the said original bill of complaint of the said Connecticut Mutual Life-Insurance Company mentioned, and thereby sought to be foreclosed; and your oratrixes here refer to the said mortgage when produced by the said original complainant on the hearing herein, for greater certainty as to the terms, conditions, and provisions thereof.

And your oratrixes further show unto your honor, and charge the fact to be, that the said Mary Beers mortgaged her said property, the premises herein-before described, to secure the individual indebtedness of the said Cyrenius Beers and for no other purpose whatsoever, and that she
78 thereby became, in respect of the said mortgage upon her property, and to that extent, the surety of the said Cyrenius Beers, all which the said Connecticut Mutual Life-Insurance Company at and before the making of said mortgage well knew, and that the said mortgage recited in substance that the said premises belonged to the said Mary Beers as her separate property, and that the title thereto was vested in her.

And your oratrixes further show unto your honor that after the execution and delivery of the said mortgage as aforesaid, on or about the eighth day of October, in the year 1869, the said Mary Beers departed this life at the city of Chicago, in said county, being at the time of her decease seized and possessed of the equity of redemption in the said mortgaged premises above described as aforesaid, having before her decease duly made and published her last will and testament, which she left unrevoked, whereby she devised and bequeathed to the said Cyrenius Beers all the estate, real and personal and mixed, whereof she died seized and possessed, including her interest in the said mortgaged premises, to be held by him

in trust, to receive the rents, income, and profits thereof during his life, with remainder to her children, the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers, share and share alike, and to their heirs and assigns, forever, of which said will she thereby appointed the said Cyrenius
79 Beers to be the executor, and which said will was afterwards duly admitted to probate in the county court of Cook County, and letters testamentary thereupon were duly issued by said court to the said Cyrenius Beers, and he thereupon qualified and undertook the duties of said executorship, a copy of which said will is attached to the said original bill of complaint, to which and to a certified copy or the original thereof when produced your oratrixes beg leave to refer for greater certainty and particularity as to the terms thereof, and that thus by the said will at most a life estate for his own life only in the said premises, subject to the said mortgage, was on the decease of the said Mary Beers vested in him the said Cyrenius Beers, and the remainder in fee in said premises was vested on the decease of said Mary Beers in the said Mary C. Foster, Resia J. Beers, and Charles G. Beers, who were the only children and heirs at law of her, the said Mary Beers.

And your oratrixes further show unto your honor that after the decease of said Mary Beers as aforesaid, and on or about the 24th day of February, in the year 1874, and at or about the time when the said indebtedness of the said Cyrenius Beers, secured by the said mortgage, became due and payable by the terms of said bond or obligation in writing, the said original complainant, The Connecticut Mutual Life-Insurance Company, in and by a certain agreement then entered into by and between
80 it, the said Connecticut Mutual-Life Insurance Company, and said Cyrenius Beers, and upon a good and valuable consideration did give to the said Cyrenius Beers further time for the payment of said indebtedness, and did extend and postpone the time of payment of the said indebtedness of the said Cyrenius Beers, evidenced and secured by said bond or obligation in writing, and also secured by said mortgage upon the premises herein-before described belonging to the said Mary Beers as aforesaid until the 24th day of February, which would be in the year 1879, being for the period of five years, which said extension and postponement of the time of payment of said indebtedness was made upon the terms and conditions contained in a certain memorandum of agreement in writing, under seal then made and entered into by and between the said original complainant and said Cyrenius Beers, and in consideration of the covenants and agreements in said memorandum of agreement contained on the part of said Cyrenius Beers, and, among other things, in consideration that the said Cyrenius Beers did in and by the said memorandum of agreement covenant and agree to pay to said original complainant the said principal sum of twenty thousand dollars on the 24th day of February, 1879, and also interest thereon at the rate of nine per cent. per annum half-yearly, to wit, on the 24th day of each of the months of August and
81 February, which would be in each and every year during such extended time according to the tenor and effect of the ten coupons or due-bills signed by said Cyrenius Beers bearing even date and given therewith, and that in accordance with said memorandum of agreement said Cyrenius Beers executed and delivered to said original complainant, his ten coupons or due-bills each for the sum of nine hundred dollars, and

being for the said half-yearly instalments of interest on said sum of twenty thousand dollars during said extended time, and due consecutively one every half year on the days on which said interest was payable as aforesaid, which agreement in writing for such extension is the same mentioned in said original bill of complaint of the Connecticut Mutual Life-Insurance Company, and your oratrixes here beg leave to refer to the said original agreement and to the said coupons last mentioned, now in possession of said original complainant, when by it produced on the hearing hereof, for greater certainty.

And your oratrixes further shew unto your honor that the said agreement for an extension and postponement, and giving of further time to said Cyrenius Beers for the payment of said indebtedness, and said extension and postponement of the time of payment thereof, as aforesaid, were made without the consent or knowledge of your oratrixes, or
82 of either of them, or of said Charles G. Beers, and that your oratrixes did not, nor did said Charles G. Beers, in any way consent to or authorize the same, nor did any or either of them so consent to authorize the same; and that they did not, nor did any or either of them, have any knowledge, notice, or information before or at the time of making such extension, nor until years thereafter, of the same; and that they have not, nor have any or either of them, adopted or ratified the said extension or acknowledged, adopted, or ratified the lien of the said pretended mortgage on the said premises above described since they learned of said extension.

And your oratrixes further show unto your honor that said Charles G. Beers, at the time of making said extension and postponement of the time of payment of said indebtedness of said Cyrenius Beers by said original complainant as aforesaid, and for a long time thereafter, was a minor under the age of twenty-one years, and incapable of giving a valid or binding consent or assent to the extension and postponement, and that no one was authorized to give for *them* a valid or binding consent or assent thereto, and that no one did give or pretend to give for him any such consent, and that he, the said Charles G. Beers, became of full age on or about the
day of , in the year , and that he has not, since he has so
83 become of full age, in any way or manner recognized or acknowledged or ratified or adopted or approved the said extension and postponement or the lien of said pretended mortgage on the said premises above described.

And your oratrixes are advised, and therefore charge the fact to be, that the said Mary Beers in her life-time having mortgaged her said property to secure the said indebtedness of said Cyrenius Beers, the said property of said Mary Beers so mortgaged, or the said Mary Beers as to her said property so mortgaged, and in respect of the said mortgage, occupied the position of surety of the said Cyrenius Beers, and after the decease of said Mary Beers the said property and premises above described continued to occupy the position of surety as aforesaid for the payment of the said indebtedness, according to terms of said bond or obligation in writing, until the said extension of the time of payment thereof was made as aforesaid, and your oratrixes and said Charles G. Beers from and after the decease of said Mary Beers in respect of the said mortgage upon the said premises above described, and as owners and seized of a vested remainder in fee in said premises

were in the like position of suretyship for the payment of said indebtedness, according to the terms of said bond, after the decease of said Mary Beers and until said extension was made as aforesaid, and in the
84 same position in respect of the said indebtedness of said Cyrenius Beers and of said mortgage to secure the same, and entitled to the same rights and remedies and protection as the said Mary Beers might claim or claimed in her life-time, and that as against and in respect of said pretended mortgage the said Mary Beers in her life-time was, and your oratrixes and said Charles G. Beers since her death were and are, entitled to all the rights and remedies and to the benefit and protection of all the rules of equity to which sureties are entitled, or which are applied for the protection of sureties in a court of equity, and your oratrixes and orator submit and charge that said agreement for an extension and postponement of the time of payment of said indebtedness of said Cyrenius Beers and the said extension and postponement thereby provided for and granted, operated as and were a release of the said mortgage and of all claim, incumbrance, or charge or pretended trust in favor of the said original complainant for the security or payment of said alleged indebtedness of Cyrenius Beers to said original complainant, as against or upon the said premises above described, or as against or upon the remainder in fee in said above-described premises after the life-estate for the term of his own life, which was vested in the said Cyrenius Beers by and under the will of the
85 said Mary Beers as aforesaid, if any such life-estate was so vested in him, and as against or upon any property or estate, real or personal, of the said Mary Beers pledged or charged with a trust to secure or provide for the payment of said alleged indebtedness of said Cyrenius Beers, whether the same was or is claimed to have been so pledged or charged by mortgage or otherwise before the death of said Mary Beers or by her last will or testament.

And your oratrixes and orator further submit and charge that by the said extension and postponement of the time of payment of the said alleged indebtedness of said Cyrenius Beers to the original complainant, the said premises above described were, or the remainder in fee after the life-estate, if any such life estate there was, of said Cyrenius Beers aforesaid, in the said premises, was fully released and discharged of and from all lien, charge, claim, or incumbrance of, through, or under the said alleged mortgage, and that said alleged mortgage thence has been and is a cloud upon the title of said premises.

And your oratrixes and orator further show unto your honors that on or about the twenty-fifth day of February, in the year 1878, the said Cyrenius Beers departed this life at the said city of Chicago, in said district, and that by and upon his decease any life-estate for his own life which was in the said Cyrenius Beers in the said premises above described
86 as aforesaid determined, and thereupon the remainder in fee in said premises which was vested in possession in the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers came into possession as an estate in fee-simple absolute, and that if the said pretended mortgage was, notwithstanding the said extension and postponement of the time of payment of said indebtedness, secured thereby as aforesaid, a valid subsisting lien, claim, or charge upon the said life-estate of said Cyrenius Beers, in said premises prior to the decease of said Cyrenius Beers, which your oratrixes

deny, then your oratrixes submit and charge that such lien, claim, or charge of, through, or under said mortgage determined and became extinguished with said life-estate upon the decease of said Cyrenius Beers as aforesaid.

And your oratrixes and orator further shew unto your honors that said Charles G. Beers, by deed dated on or about the first day of March, in the year 1878, conveyed unto the said Mary C. Foster and Rissa J. Beers all his interest, right, and title in and to the said premises above-described, by his quitclaim deed of that date, by him duly executed, acknowledged, and delivered to the said Mary C. Foster and Rissa J. Beers, and which was filed for record in the recorder's office of said county of Cook, in the year 1879, as by reference to the said deed or a copy thereof when produced on the hearing hereof and to the record
87 thereof will more fully appear, and your oratrixes, by virtue of said deed became vested with whole title to the said premises above described in fee-simple absolute, which said deed last named was, on or about the day of , A. D. 1879, and before the record thereof, duly acknowledged according to law by said Cyrenius Beers.

And your oratrixes further shew unto your honors that by the said deed last named, from the said Charles G. Beers to your oratrixes, the whole title to said premises above described became and was vested in your oratrixes in fee-simple, and your oratrixes now are the owners and well seized thereof in fee-simple, and are now in possession of the said premises.

And your oratrixes further shew unto your honors that said original complainant, the Connecticut Mutual Life-Insurance Company, with a view to complicate the title of your oratrixes to said premises, and to defeat the same and to annoy and vex your oratrixes in the premises, threaten to foreclose the said pretended mortgage, and are now seeking by said original bill herein to foreclose the same.

And your oratrixes further shew unto your honors that said premises are in the actual possession or occupancy of said defendant, Andrew Brown, as tenant of your oratrixes, said Mary C. Foster and Rissa J. Beers.

And your oratrixes well hoped that the said original complain-
88 ant, the Connecticut Mutual Life-Insurance Company, would have released the said pretended mortgage, and would thus have removed the said cloud from the title of your oratrixes, but now so it is, may it please your honors, that the said original complainant, the Connecticut Mutual Life-Insurance Company, although often applied to and requested by your oratrixes, utterly refuses so to do, and sometimes pretends that said pretended mortgage is a valid subsisting incumbrance and charge upon the said premises above described, and the said premises are charged with the payment thereof, and sometimes also pretends that the said Mary Beers in and by her said will imposed upon all of her estates, real and personal, including the said premises above described, a trust that said estates should be first applied to the extinguishment of said bond and mortgage before said Cyrenius Beers or any other person claiming under said will should have any beneficial use of said estates, and to that end expressly authorized and empowered said Cyrenius Beers to mortgage, charge, or incumber her estate and every part thereof, or to sell the same in his discretion, and also sometimes pretend that under said will said Cyrenius Beers had power to extend said mortgage as a lien and charge upon said land so as to bind your oratrixes and said Charles G. Beers and their estate therein, and that

said Cyrenius Beers did, in pursuance of said pretended power,
89 extend the same; as to all which pretences your oratrixes charge the contrary, and that said pretended mortgage is not a valid or subsisting lien, charge, or incumbrance upon the said premises, but has been and is by the said extension and postponement fully released and discharged in equity as against the said premises and every part and parcel thereof, and that by the said agreement for an extension and postponement as aforesaid the said Connecticut Mutual Life-Insurance Company elected to give up the said lien and security upon said premises under said mortgage, and to take the obligation and the promise of said Cyrenius Beers to pay the said indebtedness with interest at the rate of nine per cent. per annum, according to the terms of said agreement for an extension and postponement as aforesaid, instead of the security before that time held in the said bond and mortgage for the payment of said alleged indebtedness according to the terms of said bond.

And the said Connecticut Mutual Life-Insurance Company also sometimes pretends that the said Cyrenius Beers acquired in and by said last will and testament an estate in fee-simple in said above-described premises, and that said Mary C. Foster, Rissa J. Beers, and Charles G. Beers acquired whatever interest they may have had at the time of filing said original bill in the said premises above described by inheritance
90 from Cyrenius Beers, while your oratrixes charge the contrary, and that they, the said Mary C. Foster Rissa J. Beers, and Charles G. Beers, acquired their interest from the said Mary Beers as purchasers under and by the said last will of her, the said Mary Beers, and that the said Cyrenius Beers at most got but a life-estate in said premises by said will, and that the remainder in fee in said premises after the said life-estate was devised by said will to the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers, who took the same through said will as purchasers from said Mary Beers, and not as heirs at law of said Cyrenius Beers.

All which pretence, actings, and doings are contrary to equity and good conscience and tend to the manifest prejudice of your oratrixes in the premises. Forasmuch as your oratrixes are without remedy in the premises except in a court of equity, to the end therefore that the said defendants may, if they can show why your oratrixes should not have the relief hereby prayed, and may full, true, and perfect answers make (not under oath, answers under oath being hereby waived according to the rules and practice of this court) to all and singular the premises as fully and particularly as if the same were hereinafter repeated, and that the said pretended mortgage may be deemed to be a cloud on the title of your oratrixes to said premises, and said defendant, the Connecticut Mu-
91 tual Life-Insurance Company, may be required by the decree of this honorable court to release the said mortgage of record within a time to be fixed by the court, and in default thereof that Henry W. Bishop, esq., master in chancery of this court, or some other competent and proper person as special commissioner, be authorised and directed to make, acknowledge, and deliver such release, and that the release so made may be decreed to be effectual to release and discharge said pretended mortgage, and that the title of your oratrixes to said premises may be quieted, and that the said defendant, the Connecticut Mutual Life-In-

surance Company, its agents, officers, and attorneys, and all other persons claiming by, through, or under it, since the said 24th day of February, 1874, may be perpetually enjoined and restrained from attempting to enforce the said pretended mortgage as against the said premises herein above described, or in any way interfering with the said premises by, through, or by reason of the said pretended mortgage, or of the said pretended bond or obligation in writing or indebtedness of said Cyrenius Beers, and that your oratrixes may have such further and other, or such further and other or different relief as to your honors shall seem meet and to equity shall appertain:

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said The Connecticut Mutual Life-Insurance Company, Charles G. Beers,
92 and Andrew Brown, thereby commanding them and every of them at a certain day and under a certain penalty personally to be and appear before this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet. And your oratrixes will ever pray, etc.

MARY C. FOSTER,
RISSA J. BEERS,
By HERBERT, QUICK & MILLER,
Their Solicitors.

HERBERT, QUICK, AND MILLER,
Of Counsel.

(Endorsed:) Filed June 16, 1879. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 17th day of October, A. D. 1879, in the record of the proceedings of said court in said-entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
CHARLES G. BEERS ET AL. } In chancery.

The pleas of defendants, Charles G. Beers, Rissa J. Beers, and Mary C. Foster, and of defendants, Orrington C. Foster and Andrew Brown,
93 having been heretofore set down for argument, and the court having heard the argument of counsel and having considered the same, it is on motion of complainants' solicitors ordered that the said pleas be, and the same are, overruled, and that the said defendants, Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, be, and they are hereby, assigned to answer the bill of complaint herein by the next rule day, with leave to the said defendants or any or either of them to set up and interpose in and by way of their answers the same matters of defence as are set up in said pleas or any of them as they may be advised—costs to this period to abide the event of the suit.

Afterwards, to wit, on the 3rd day of November, A. D. 1879, said de-

fendants, Charles G. Beers, Rissa J. Beers, et al., by their solicitors filed in said clerk's office their answer to the bill of complaint in said-entitled cause, which said answer is in the words and figures following, to wit:

Answer of Charles G. Beers, Rissa J. Beers, et al.

94 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the district aforesaid. In chancery.

The joint and several answer of Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, five of the defendants to the bill of complaint of the Connecticut Mutual Life-Insurance Company, complainant.

These defendants now and at all times hereafter saving and reserving to themselves and to each of them all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint, for answer thereunto or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them, or any or either of them to make answer unto, they, these defendants, severally answering, say:

95 That they have no personal knowledge, but have been informed and believe it to be true as alleged in said complainant's said bill of complaint, that the said complainant did lend and advance the sum of money in said bill of complaint alleged to the said Cyrenius Beers, at or about the time, and as in said bill of complaint stated, and that in order to secure the repayment thereof to the complainant, with interest thereon at the rate of eight per cent. per annum, payable half-yearly, said Cyrenius Beers executed and delivered to complainant his bond or obligation in the penal sum, and bearing date and conditioned as in the said bill of complaint in that behalf stated; and that said interest payments until the said principal sum should become due were further secured by ten coupons given with said bond, as in said bill alleged; and although these defendants have no knowledge or information, save from the said bill of complaint, whether any or what proviso or provisos, if any, were added to or contained in said bond, they, these defendants, for the purposes of this suit, are willing to admit, and do admit, that to said bond there

96 was a proviso added whereby, in effect, it was agreed and understood as in said bill of complaint in that behalf stated.

And these defendants, further answering, say that they have been informed, and believe it to be true, that for the purpose of further securing the repayment to the said complainant of said sum of money in said bill of complaint mentioned, so loaned as aforesaid, with interest thereon as aforesaid, the said Cyrenius Beers and Mary Beers executed and delivered unto the said complainant their certain indenture of mortgage under their hands and seals, bearing date as in said bill of complaint alleged, and that thereby, after reciting as therein mentioned, it was witnessed in substance as in said bill of complaint in that behalf stated, and that the execution and delivery of said indenture of mortgage was afterwards duly

acknowledged according to law by the said Cyrenius Beers and Mary Beers at the time, and as in said bill of complaint stated; and that afterwards said indenture of mortgage was filed for record and duly recorded at the time and place, and as in said bill of complaint
97 stated.

And these defendants, further answering, say that they believe it to be true, and admit that in and by said mortgage it was covenanted and agreed by the said Cyrenius Beers, that he, the said Cyrenius Beers, would well and truly pay or cause to be paid unto the said complainant, its successors or assigns, the said principal sum of money mentioned in the condition of said bond and the interest thereon, according to the said condition; but these defendants deny that there was any covenant or agreement in the said mortgage by or on the part of the said Mary Beers for the payment of the said sum of money or of any part thereof, or of the interest thereon or of any part thereof, according to the said condition or otherwise.

And these defendants, further answering, say that they believe it to be true, and admit that on the twenty-fourth day of February, A. D. 1874, when said original bond had fully matured and was not paid, the said Cyrenius Beers requested of the complainant an extension of time
98 for the payment of said bond, and that complainant agreed to extend the time for the payment thereof for the term of five years, and until the twenty-fourth day of February, A. D. 1879, upon the terms and provisions and conditions contained in the memorandum of said agreement in the said bill of complaint mentioned; and these defendants say that the said memorandum of agreement was duly made and entered into, and executed by and between the said Cyrenius Beers and the said complainant, at Chicago, in said district, at the time last mentioned, and that a copy thereof is hereto attached marked "Exhibit A," which these defendants ask to make and be taken as part of this their answer, and they here refer to the same as part hereof for greater certainty as to the terms, stipulations, and provisions of said agreement of extension.

And these defendants, further answering, say that in accordance with and by the said agreement of extension the said complainant did extend and postpone the time of payment of said principal indebtedness of
99 twenty thousand dollars of said Cyrenius Beers, in the said bill of complaint mentioned, until the 24th day of February, in the year 1879, and that said extension and postponement was made in consideration of the covenants and agreements of the said Cyrenius Beers in the said memorandum of said agreement contained, and, among others, the covenant and agreement of said Cyrenius Beers in said memorandum of agreement contained that he would pay the said complainant, its successors and assigns, said principal sum of twenty thousand dollars on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy-nine, at the place in the condition of said bond mentioned, and also interest thereon at the rate of nine per centum per annum, half-yearly, to wit, on the twenty-fourth days of each of the months of August and February in each and every year during such extended time of payment, according to the tenor and effect of the ten coupons or due-bills signed by the said Cyrenius Beers, bearing even date with said memorandum
100 of agreement of extension and given therewith.

And the said defendants, further answering, say that at the city of Chicago aforesaid, at the same time with the making the said agreement of extension, to wit, on said twenty-fourth day of February, A. D. 1874, the said Cyrenius Beers did make and deliver to the said complainant, and the said complainant did accept and receive his ten coupons or due-bills signed by said Cyrenius Beers, and dated on the last-mentioned date, each for the sum of nine hundred dollars, and payable, respectively, on the 24th day of August, A. D. 1874, and on the twenty-fourth days of each of the months of February and August in each of the years 1875, 1876, 1877, and 1878, and the month of February in the year 1879, one of which said coupons or due-bills was as follows, that is to say:

$900. Due the Connecticut Mutual Life-Insurance Company, or order, nine hundred dollars, on the twenty-fourth day of August, A. D. 1874, payable at such place in the city of New York, in the State
101 of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns may in writing appoint, and in default of such appointment then at the office of the Connecticut Mutual Life-Insurance Company in the city of Hartford, in the State of Connecticut, being for the payment of the half-yearly interest due that day on my bond to said The Connecticut Mutual Life-Insurance Company of date February 24th, 1869, conditioned for the payment of $20,000.00, on the twenty-fourth day of February, A. D. 1874, the payment of which has been conditionally extended to the twenty-fourth day of February, A. D. 1879.

Chicago, February 24th, 1874.

CYRENIUS BEERS.

And the other nine of which coupons or due-bills were the same in amount and in terms in all respects, except as to the day and year on which the amounts thereof were by the terms thereof respectively due and payable as the coupon or due-bill above mentioned and set
102 forth, and the amounts of said other nine coupons or due-bills were by the terms thereof respectively due and payable, one on the twenty-fourth day of February and one on the twenty-fourth day of August, in the years 1875, 1876, 1877, and 1878, and one on the twenty-fourth day of February, in the year 1879, as aforesaid.

And these defendants, further answering, say that the said ten coupons or due-bills last-above mentioned are the same coupons or due-bills in the said memorandum of agreement of extension mentioned as given therewith, and were given by the said Cyrenius Beers to the said complainant and accepted by said complainant to secure the interest on said indebtedness of twenty thousand dollars of said Cyrenius Beers to said complainant in said bill of complaint mentioned, at the rate of nine per centum per annum during said extended time for the payment of said indebtedness as provided in and by said agreement of extension.

And these defendants, further answering, upon information and
103 belief say that the said Cyrenius Beers did duly pay unto the said complainant the interest on said indebtedness of twenty thousand , at said rate of nine per centum per annum from said twenty-fourth day of February, in the year 1874, when said extension was made

as aforesaid, during said extended time of payment up to and including the said interest coupon or due-bill due and payable on the 24th day of August, in the year 1876, according to the terms and tenor of said memorandum of agreement, and to the terms, tenor, and effect of the said coupons or due-bills given therefor as aforesaid, and took up the said coupons or due-bills which were due and payable on or before the said twenty-fourth day of August, in the year 1876, at the times the same became respectively due.

And these defendants, further answering, admit that said principal sum matured and became due on the twenty-fourth day of February, A. D. 1879, when the said extended time for the payment thereof expired, and they believe it to be true that the whole amount of said principal
104 sum still remains, as to and against the said Cyrenius Beers and his estate wholly due and unpaid, and that the other five of said coupons or due-bills given with said agreement of extension as aforesaid, than those paid and taken up as aforesaid; that is to say, that the five of said coupons or due-bills which, by the terms thereof, were due and payable after the twenty-fourth day of August, A. D. 1876, are unpaid, but they deny that the estate of said complainant in said land and premises in said bill of complaint described has become absolute at law or otherwise, and they deny that the said complainant had any estate, right, title, or interest, claim, or demand in, to, or upon the said land and premises or any part thereof, of any kind or nature whatever, and they claim and insist that whatever estate, right, title, or interest, claim, or demand, the said complainant may have had or pretended to have, has been fully released and discharged and fully ceased and determined, as hereinafter more fully stated, and charged; and they deny that said interest coupons or due-bills given by said Cyrenius Beers at the time of making and with
105 said agreement of extension as aforesaid, or any or either of them were ever in any way charged upon or made a lien on the said premises or any part thereof in said bill of complaint described, or that the said premises or the estate of said Mary Beers, or any part thereof, were ever charged or chargeable with or liable for the payment of the same or any or either of them or any part thereof in any way.

And these defendants, further answering, say that they have not been informed, except by complainant's said bill, but they believe it to be true, that it was covenanted and agreed in and by said mortgage, in regard to taxes and tax sales, and doing and permitting nothing to be done tending to impair the value or the security intended to be effected by said mortgage, and in regard to the event of said complainant's expending money therefor substantially, as stated in that behalf in said bill of complaint.

And these defendants, further answering, say that they believe it to be true that after the making of said mortgage large or some sums of
106 money became due and payable for taxes and assessments as in said bill alleged, but these defendants, upon information and belief, deny that the said complainant has ever paid, laid out, or expended any sum or sums of money therefor, or on account thereof, or to protect said premises from sale, or to redeem the same for or on account of such taxes or assessments.

And these defendants, further answering, say that they have no knowledge or information, save from complainant's bill of complaint, and they

are unable to state from their belief, or otherwise, whether or not said complainant has paid or expended considerable sums, or any sum or sums of money, to procure insurance upon the building upon said premises; but these defendants deny that they, or any or either of them, are or have been under any obligation to insure or keep up any insurance upon said mortgaged premises for the benefit of said complainant, or that they, these defendants, or any or either of them, or the said premises, or any part
107 thereof, or the estate of said Mary Beers, or any part thereof, are in any way liable for, or chargeable with or on account of, such pretended payments by said complainant for insurance, or any part thereof.

And these defendants, further answering, admit that the said Mary Beers departed this life on or about the eighth day of October, A. D. 1869, having a last will and testament which was duly probated in the county court of Cook County, in the State of Illinois, a copy of which last will and testament is attached to and made a part of said complainant's bill of complaint as therein stated, and these defendants say that the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers in said will mentioned are the said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, and that they, the said defendants last named, were the children and the only children and heirs at law of said Mary Beers, her surviving; but these defendants deny that in or by the said last will and testament the said Mary Beers devised or bequeathed all or any her real, personal, and mixed estate to the said Cyrenius Beers for life and by the same instrument
108 gave said estate to his heirs after his decease, or that there was created an estate in fee-simple in all or any of her said estates in said Cyrenius Beers; and these defendants deny that in or by said last will and testament the said Mary Beers imposed any trust on all or any of her estates coming to the hands of said Cyrenius Beers or otherwise; that the said estates, real, personal, or mixed, or any or either of them, or any part thereof should first be applied to the extinguishment of said bond and mortgage before said Cyrenius Beers or his heirs, or any other persons claiming under said will, should have any beneficial use of said estates, or that she, the said Mary Beers, to that end authorized or empowered said Cyrenius Beers to mortgage, charge, or encumber her estate, or any part thereof, or to sell the same in his discretion, or that she, the said Mary Beers, imposed any trust or charge upon her estates, or any or either of them, or any part thereof, by her said last will and testament, for the benefit of complainant or for its security, or for the payment of said indebtedness to complainant, or any part thereof, or that the estate of
109 said Mary Beers, or any part thereof, is liable for the same or any part thereof; and these defendants charge and insist that by the said last will and testament of Mary Beers no other estate, right, title, or interest in the estates of said Mary Beers was given (if any at all was given) to the said Cyrenius Beers than a life estate for his own life, and that thereby as vested remainder in fee in all the estates of said Mary Beers was given and devised to the said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, her only children and heirs at law, and that upon the death of said Mary Beers the said defendants last named became invested with said remainder in fee as a then present vested estate, and that upon the decease of said Cyrenius Beers the said last-named defendants became seized and possessed of an absolute estate in fee-simple

in all the estates of said Mary Beers; and these defendants here ask leave to refer to the said last will and testament of said Mary Beers, or a certified copy thereof when produced, and to the copy thereof attached
110 to and made a part of said complainant's bill of complaint for certainty as to the provisions thereof.

And these defendants, further answering, admit that said Cyrenius Beers was duly appointed the executor under said last will and testament on or about the twenty-sixth day of March, in the year 1872, at which time said last will and testament was admitted to probate as aforesaid, and that he filed in said county court an inventory of the estate of said Mary Beers on or about said date last mentioned; but these defendants deny that it appears by said inventory that the sum of twelve thousand dollars or any sum of money came to the hands of said executor, Cyrenius Beers, as stated in said bill of complaint; but these defendants say that it did appear by said inventory that there was at the date and filing thereof as reported by said Cyrenius Beers certain policies of insurance therein mentioned, inventoried, and accounted for belonging to the estate of said Mary Beers, under which there had been loss by the great fire of October
111 1871, at said city of Chicago, and on which there was in said inventory to be due and collectible in the aggregate the sum of eleven thousand five hundred and seventy dollars and forty cents or thereabouts; and these defendants admit that afterwards, on the 28th day of September, in the year 1877 (and not in the year 1876, as stated in said bill), said Cyrenius Beers filed in said county court of Cook County his final account as such executor, and that by such final account he charged himself with the amount aforesaid, eleven thousand five hundred and seventy dollars and forty cents, less the sum of one hundred and thirty dollars and eighty cents, with which he credited himself for payments made by him for claims proved against said estate, and for expenses and costs of said probate proceedings, and that the defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, did, by their writing, endorsed upon said account and filed therewith, consent that said account might be approved, and that they, as heirs of said Mary Beers, were satisfied therewith and of the acts and doings
112 of said Cyrenius Beers as such executor; but these defendants deny that said Mary C. Foster, Rissa J. Beers, and Charles G. Beers, or either or any of them, did thereby or otherwise, at that time or at any time, assent or agree that said Cyrenius Beers was to hold said sum, or any part thereof, or any sum, as a trustee for the pretended uses and trusts in said bill of complaint alleged or any or either of them; and these defendants say that the sole purpose and effect of the said written consent to the said final account was to save and avoid the trouble of the said Cyrenius Beers serving the said heirs of Mary Beers with notice of the presentation of his said account, and to satisfy said county court that they, said Mary C. Foster, Rissa J. Beers, and Charles G. Beers had no objections to offer thereto, or to the approval thereof.

And these defendants, further answering, admit that said Cyrenius Beers departed this life intesta'e, at said city of Chicago, on or about the 25th day of February, A. D. 1878, leaving him surviving as his only heirs at law the said defendants, Mary C. Foster, Rissa J. Beers, and
113 Charles G. Beers, and that no administration has been taken out on his estate; and these defendants believe it to be true that said

Cyrenius Beers did not apply said sum of money so charged to himself in and by his said final account as executor of said Mary Beers to the extinguishment of his said indebtedness to complainant in its said bill of complaint mentioned, but these defendants deny that there is due from the estate of said Cyrenius Beers any trust-fund as charged in said bill of complaint, or that said fund, which by said final account was shown to belong to said estate of Mary Beers, ought, in equity or otherwise, to be applied to the extinguishment of said indebtedness of Cyrenius Beers to said complainant in its said bill of complaint mentioned.

And these defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, further answering, deny, and the said defendants, Orrington E. Foster and Andrew Brown, further answering, believe the said denial to be true that they, the said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, or any or either of them, have received said fund
114 shown by said inventory and final account of said Cyrenius Beers as executor as aforesaid, to belong to said estate of said Mary Beers, or any part or portion thereof, or that they, the said defendants, or any or either of them, hold the same or any part thereof, or that they, the said defendants, or any or either of them, have ever disposed of or had the control of, or have been chargeable with or had anything whatever to do with the control, management, or disposition thereof, and they say that no distribution of the personal estate of said Mary Beers was ever had or made to them, or any or either of them, and these defendants have not, nor have any or either of them, any knowledge or information as to the disposition of said fund or any part thereof, but they, these defendants, deny that said complainant has or ever had any right or claim to, or any right or interest to inquire as to the disposition of the personal estate of said Mary Beers or any part thereof, or to any discovery in regard thereto.

And these defendants, further answering, deny that the said Cyre-
115 nius Beers acquired or had, as charged in said bill, an estate in fee in all or any of the estates of the said Mary Beers by the said last will and testament of said Mary Beers or otherwise; and they also, further answering, deny that the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers acquired the interest they have or had in said premises in said bill of complaint described by inheritance from the said Cyrenius Beers; and they, these defendants, say that the said Mary Beers, at and before the making, execution, and delivery of said mortgage in said bill of complaint mentioned, and thence afterwards until and at the time of her decease as aforesaid, was the owner and well seized and possessed in her own right of the said land and premises in the said bill of complaint described in fee-simple absolute, and that upon the decease of said Mary Beers the said Cyrenius Beers was given and invested by her said last will and testament or otherwise, with no right, title, or interest, or estate in or to said land and premises other or different than a life estate therein for his own
116 life, even if he was given any right, title, interest, or estate therein whatever (which these defendants do not admit, but submit the same with the construction of said will to the court), and that upon such decease of said Mary Beers a vested remainder in fee limited, to take effect in possession on the determination of the life and life estate, if any, of the said Cyrenius Beers was vested in the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers, who were the only children and heirs at law of her,

the said Mary Beers, her surviving, and that upon the decease of said Cyrenius Beers as aforesaid, the said defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers became and were the owners in fee-simple of the said land and premises.

And these defendants, further answering, say that they believe it to be true that it was provided in and by said indenture of mortgage that said Cyrenius Beers should and would keep the buildings erected upon said premises insured, and would assign the policies to complainant substantially as stated in said complainant's bill of complaint, and that said
117 complainant should hold the same as collateral and additional security and should have the right to receive and collect any moneys payable on said policies and apply the same in accordance with the terms of said mortgage, but that said complainant should not be required to collect said money so receivable, but might at its election reassign and deliver said policies to the said Cyrenius Beers substantially as stated in said bill of complaint.

And these defendants, further answering, admit that policies of insurance were taken out on said buildings, on said premises in said bill of complaint described, by said Cyrenius Beers, and duly assigned to said complainant, and that the said buildings were destroyed by fire in the month of October, A. D. 1871.

And these defendants, further answering, say that they have no knowledge or information, save from said bill of complaint, and are unable to state from belief or otherwise, as they have no information sufficient to
118 form a belief, whether or not the said Cyrenius Beers applied to complainant or requested it in case said complainant should be unwilling to reassign and deliver to said Cyrenius Beers said policies of insurance or allow him to collect the money due thereon, that complainant would collect the money due on said policies and withhold the same from application on the said indebtedness and deposit the same specially as a separate fund and would cause the same to be paid over and delivered to the said Cyrenius Beers when said Cyrenius Beers should have restored or rebuilt the buildings on said lot, or whether any, and if any, what, agreement in regard to the matters last mentioned, was made by or between the said Cyrenius Beers and the said complainant, or whether the said alleged agreement in that behalf in said bill of complaint mentioned, or any, if any, what agreement was carried out or completed, and they leave the said complainant to make proof of the allegations of its said bill of complaint in regard thereto, as it may be advised.

119 And these defendants, further answering, upon information and belief say that the said complainants did not reassign or deliver said policies of insurance so assigned to it as aforesaid, or any or either of them to said Cyrenius Beers, but retained and kept them, and after the said destruction of said buildings by fire as aforesaid, collected and received upon said policies of insurance a large sum of money, amounting in the whole to the sum of twelve thousand dollars or thereabouts or some other or greater sum of money, but these defendants have no knowledge or information except from said complainant's said bill of complaint, and are unable to state from belief or otherwise, and therefore leave complainant to prove as it may be advised whether or not said complainant paid over said insurance money or any part thereof to said Cyrenius Beers; but these de-

fendants, further answering, say that such payment if made, and any agreement therefor or in respect thereof, whether it was such as stated in that behalf in said bill of complaint or otherwise made, if any, was
120 made by or between the said Cyrenius Beers and the said complainant, was made without the knowledge or consent of these defendants, or any or either of them, and they submit and charge that as against them, the said defendants, or as against the estate of said Mary Beers, the same cannot be set up or insisted upon.

And the said defendants, further answering, say that they have no knowledge or information save from said bill of complaint, and are unable to state from belief or otherwise, whether or not said insurance money, or any part thereof, if received by said Cyrenius Beers, was paid over by him to the estate of said Mary Beers, or applied to the uses of said estate, or how the same or any part thereof was paid, applied, or disposed of, and they leave said complainant to prove, as it may be advised, the allegations of said bill of complaint in that behalf; but these defendants, Mary C. Foster, Rissa J. Beers, and Charles G. Beers, deny, and said defendants, Orrington C. Foster and Andrew Brown, believe such denial to be true; that the said Cyrenius Beers paid over to them, the said
121 Mary C. Foster, Rissa J. Beers, and Charles G. Beers, or to either or any of them, the said money or any part thereof, or that the same or any part thereof was ever received by them, or either or any of them, or to their or either or any of their use or benefit.

And these defendants, further answering, say that it is true that said defendants, Mary C. Foster, Rissa J. Beers, and Charles J. Beers, have heretofore entered into possession of said mortgaged premises, and into the receipt and reception of the rents, issues, and profits thereof; and that afterwards, on or about the first day of March, A. D. 1879, the said Charles G. Beers, by his deed of that date duly executed, acknowledged, and delivered, conveyed all his right, title, and interest in or to said premises to the said Mary C. Foster, and Rissa J. Beers, and that since the date last-mentioned said Mary C. Foster and Rissa J. Beers have been, and still are in possession of said premises, and in the receipt of the rents, issues, and profits thereof as they of right might; but these de-
122 fendants deny that said rents, issues, and profits have been or are being by them misappropriated or misapplied or diverted from any uses to which they should be applied; and they deny that there are any trusts created by the will of said Mary Beers in regard to the same or to the application or disposition thereof which are being or have been thereby violated.

And these defendants, further answering, admit that there is now situated upon said mortgaged premises the three-story brick building number 73 South Water street, in the city of Chicago, and that the same is now in the actual occupancy of the said defendant, Andrew Brown, as tenant of said Mary C. Foster and Rissa J. Beers, under a demise thereof made to him by them on or about the first day of March, A. D. 1879, and that the annual rent of said premises is two thousand dollars.

And these defendants, further answering, as to the allegations in said bill of complaint that said premises in said bill described are a scanty
123 and inadequate security for the amount of money claimed by said complainant to be due and owing to it, and that said premises and

the estate of said Mary Beers constitute the only security of complainant for the recovery of its said indebtedness, and that upon the sale of said premises the proceeds of such sale would be inadequate to satisfy said debt, deny that the said premises or any part thereof, or the estate of said Mary Beers or any part thereof, are in anywise chargeable with or liable for the payment of said indebtedness or any part thereof, or that the estate of said Mary Beers was in any manner under or by her last will and testament aforesaid charged with any trust for the payment or discharge of any encumbrance thereon or of the indebtedness of said Cyrenius Beers to said complainant or any part thereof, as charged in said bill of complaint of said complainant; and they charge, claim, and submit that any charge, lien, right, or claim which the said complainant may have had or claimed under or by the said mortgage, or under or by the said last will and
124 testament, if any there was, was fully released and discharged and determined upon, and by the said extension of the time of payment of said indebtedness as hereinafter mentioned and set forth, and denying and charging, claiming, and submitting, as last aforesaid, these defendants deny that if the said alleged mortgage were or should be held to be a valid and subsisting lien or encumbrance on or against said premises, the said premises would be an insufficient, scanty, or inadequate security for what is claimed by the said complainant to be due, or for what should be found due to it upon said indebtedness.

And these defendants, further answering, upon information and belief deny that by the terms of said mortgage all or any of the rents, issues, or profits of said premises were expressly or otherwise mortgaged to complainant or pledged as security for said mortgage debt or the interest thereon or any part thereof, or for the protection of said premises or the title thereof against the liens of taxes or from tax sales, or that under
125 or by virtue of any trusts created by said will of said Mary Beers, the rents or profits of said property or any part thereof were as a part of her estate or otherwise charged with the burden of satisfying or removing the lien of encumbrances upon said estate or the alleged mortgage of complainant or that the said complainant is in any way entitled to have the same collected or applied to the uses aforesaid, or otherwise; and these defendants admit that the same are now being collected and received by said Mary C. Foster and Rissa J. Beers as aforesaid, as they in right might and should be.

And the said defendants, Mary C. Foster and Rissa J. Beers, further answering, deny (and the said other defendants believe such denial to be true) that they, the said defendants, Mary C. Foster and Rissa J. Beers, or either of them, have refused or do refuse to pay the taxes or assessments levied or assessed upon said premises, and they say that it is more for their interest than for the interest of any other person to save and protect the said property, and it is their purpose and intention as it is
126 their interest so to do if undisturbed therein, and they, the said defendants, admit that they have refused and do refuse to pay or keep down the interest upon said indebtedness of Cyrenius Beers to complainant.

And these defendants, further answering, say that they have not, nor have any or either of them, any knowledge or information save from the said complainant's bill of complaint, and they are unable to state from

their belief or otherwise as to whether said premises were sold for taxes, as in said bill of complaint alleged, but they say that the said taxes for which said sale is alleged in said bill of complaint to have been made were levied and assessed, and such alleged sale therefor took place, if at all, during the life of said Cyrenius Beers, and while he, the said Cyrenius Beers, was in possession of said premises, claiming a life estate therein under the said will of said Mary Beers, and he was chargeable with and it was his duty, and not the duty of these defendants, to pay the said taxes
127 which were so levied and assessed during his life; and they, the said defendants, upon information and belief, say that the taxes which have been levied or assessed thereon since the death of said Cyrenius Beers have been fully paid.

And these defendants, further answering, say that by the terms of the will of the said Mary Beers, and under the same on a true construction thereof, they, the said defendants, Charles G. Beers, Mary C. Foster, and Rissa J. Beers, were, upon the decease of said Mary Beers, invested with a vested remainder in fee in said premises, which estate, on the decease of said Cyrenius Beers, became an estate in fee-simple absolute in said premises, and that by the aforesaid deed of conveyance from the said Charles G. Beers to the said Mary C. Foster and Rissa J. Beers, they, the said Mary C. Foster and Rissa J. Beers, became seized and possessed of the said premises in fee-simple absolute, and ever since have been and are so seized and possessed of said premises in fee-simple absolute as aforesaid.

128 And these defendants, further answering, say that the said Orrington C. Foster is the husband of said Mary C. Foster, and he, the said Orrington C. Foster, has, or claims to have, no other interest in the said premises than such interest as belongs to him or is given to him by the laws of the State of Illinois by virtue or by reason of his intermarriage with said Mary C. Foster, and that the said Andrew Brown has a leasehold interest in the said premises as the tenant of said Mary C. Foster and Rissa J. Beers under the demise to him hereinbefore mentioned, and that his term as such tenant by the terms of said demise extends to and until the first day of May, A. D. 1880.

And these defendants, Mary C. Foster, Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, further answering, say, and the said other defendant, Andrew Brown, believes it to be true, that the said agreement of extension and extension of the time for the payment of the said indebtedness, in said bill of complaint mentioned, of said Cyrenius
129 Beers to the said complainant was made without the knowledge or consent of these defendants, or any or either of them, and that these defendants have not, nor has any or either of them, at any time authorized, agreed to, ratified, or recognized the same in any way whatever, and that they have not, nor have any or either of them, since the same became known to them, in any way acknowledged, ratified, or consented to the same.

And these defendants, Mary C. Foster, Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, further answering, say, and said defendant, Andrew Brown, believes the same to be true, that the said indebtedness to said complainant in said bill of complaint mentioned was the indebtedness of said Cyrenius Beers, and was not, nor was any part thereof, at

any time the indebtedness of said Mary Beers, nor was she, the said Mary Beers, nor was these defendants, or any or either of them, at any time liable therefor, or for any part thereof, and that the said Mary Beers having executed the said mortgage in said bill of complaint described to secure the said indebtedness of said Cyrenius Beers, stood merely
130 in the relation of surety to that extent for the said Cyrenius Beers and not in any other relation to said indebtedness or to the parties thereto and was entitled to all the rights and remedies, legal and equitable, and to the benefit of all the rules of equity which belong to or are applied for the protection of sureties, and that the said Mary C. Foster, Rissa J. Beers, and Charles G. Beers, from and after the death of the said Mary Beers were, and the said Mary C. Foster and Rissa J. Beers, from and after the said conveyance from said Charles G. Beers to them as the grantees of said Charles G. Beers, as well as the heirs-at-law and devisees of said Mary Beers, were and are entitled to the same rights and remedies, rules of equity, benefits, and protection, and all of them, which the said Mary Beers might claim, insist upon, or interpose if she were living; and they, the said defendants, charge and submit that as against them and as against the said premises in said bill of complaint described, the said agreement of extension and the said extension and postponement of the time of
131 payment of said indebtedness as aforesaid operated as and were a full release and discharge of the said premises and of the estate of said Mary Beers and of every part thereof from the said mortgage and from all lien, claim, charge, trust, or encumbrance on said premises or any part thereof, or on the estate of said Mary Beers, whether such lien, charge, claim, trust, or encumbrance arises or is claimed under or through the said mortgage or the said will of said Mary Beers or otherwise; and these defendants severally claim all benefit, advantage, and protection which they can or may respectively claim by reason thereof, whether standing pro hoc vice as sureties or otherwise.

And the said defendants, further answering, upon information and belief say that the said complainant at and before the time of making execution and delivery of the said mortgage in the said bill of complaint mentioned, well knew that the said land and premises belonged to the said Mary Beers in her own right as aforesaid, and that she executed said mortgage
132 upon her property to secure the said indebtedness of said Cyrenius Beers and not otherwise, and that the said mortgage by its terms recited, among other things, in substance that the title to said premises was at the time of the making, execution, and delivery of said mortgage in her, the said Mary Beers.

And these defendants, further answering, say that after the said Cyrenius Beers had been appointed and had qualified as executor of said Mary Beers, and within six months therefrom the said Cyrenius Beers, as such executor, did fix upon a term of said county court of Cook County for the adjustment of all claims against the said Mary Beers or her estate, and did duly publish a notice thereof, and did also put up and post written or printed notices on the door of the court-house, and in five other of the most public places in said county of Cook, in the manner and for the time and in all respects as required by law, notifying and requesting all persons having claims and demands against said estate of Mary Beers,
133 deceased, to attend at the June term of said county court, in the year 1872 (being the term of said court fixed upon as aforesaid),

for the purpose of having the same adjusted; and that afterwards, at said June term, on the third day of June, A. D. 1872, the said last-named court did enter an order of adjudication of said estate; and that the said inventory of said estate was filed and approved in said last-named court on the twenty-sixth day of March, A. D. 1872; and that beside the said policies of insurance mentioned and accounted for in said inventory as aforesaid, there was also therein duly inventoried and accounted for the said land and premises in said bill of complaint described, and all of the estate, real and personal, belonging to said estate of said Mary Beers; but the said complainant did not, within two years after the filing of said inventory as aforesaid, nor at any time until the filing of its said bill of complaint, present, or exhibit, file, interpose, or prove any claim or indebtedness against said estate of Mary Beers; and these defendants here claim and
134 submit that if the said complainant had any claim or debt against the said estate of Mary Beers, which these defendants do not admit, but deny the same as against the said estate and as against any moneys, chattels, choses in action, or other property belonging or which belonged thereto, was at and before the filing of said bill of complaint, and is, fully and forever barred under the laws of the State of Illinois, and these defendants ask the benefit of this defense thereto with the same effect as if they had interposed the same by way of plea.

And the said defendants, further answering, say that, insisting that said alleged mortgage and all and every claim of every kind of the said complainant upon the said land and premises in said bill of complaint described, or upon the estate of said Mary Beers, deceased, or any part thereof, has been and was fully released and discharged by the extension and postponement of the time of payment of said indebtedness of said Cyrenius Beers as aforesaid, and that all claims, if any there are, of the said
135 complainant against said estate of Mary Beers have been fully barred by lapse of time and failure to establish the same within the time allowed by law as aforesaid. They, these defendants, further submit and insist that if the said indebtedness, or any part thereof, were or should be held to be a valid or subsisting charge, lien, or indebtedness upon the said premises or upon or against the estate of said Mary Beers, or any part thereof, the said moneys so collected and received by said complainant on, or on account of, said insurance policies so assigned to it as aforesaid should be allowed and credited upon the said indebtedness as of the time the same was so received as against the said premises and the said estate of said Mary Beers, and the rights and interests of the said defendants respectively therein as they are herein above set forth.

And these defendants severally deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, that there is any other matter, cause, or thing in the
136 said complainant's bill of complaint contained material or necessary for these defendants, or any or either of them, to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of these defendants, or any or either of them. All which matters and things these defendants are ready and willing to aver, maintain, and prove as this

honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs in this behalf most wrongfully sustained.

MARY C. FOSTER.
RISSA J. BEERS.
CHAS. G. BEERS.
ORRINGTON C. FOSTER.
ANDREW BROWN.

HERBERT, QUICK and MILLER,
Solicitors and of Counsel for said Defendants.

137 Memorandum of agreement made and entered into this twenty-fourth day of February, A. D. 1874, by and between the Connecticut Mutual Life-Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, and State of Connecticut, of the one part, and Cyrenius Beers, of the city of Chicago, in the county of Cook, and State of Illinois, of the other part.

Whereas the said Cyrenius Beers is justly indebted unto the said The Connecticut Mutual Life-Insurance Company in the sum of twenty thousand ($20,000) dollars, secured to be paid by the certain bond or obligation in writing of the said Cyrenius Beers, bearing date at Chicago aforesaid twenty-fourth day of February, A. D. 1869, in the penal sum of forty thousand ($40,000) dollars, conditioned for the payment to the said company, its successors or assigns, of the principal sum of twenty thousand ($20,000) dollars, on the twenty-fourth day of February, A. D. 1874, with interest thereon at the rate of eight per centum per annum, payable half yearly;

138 And whereas the said principal sum of said bond is still wholly unpaid, and the said Cyrenius Beers, party of the second part hereto, hath applied to said The Connecticut Mutual Life-Insurance Company to extend the time for the payment of said principal sum;

And whereas the said Cyrenius Beers and Mary, his wife, executed and delivered their certain indenture of mortgage to said company, bearing even date with said bond to secure the payment thereof, which said mortgage was duly recorded in the recorder's office of said Cook County;

Now, this memorandum witnesseth that the said The Connecticut Mutual Life Insurance Company, in consideration of the covenants and agreements on the part of the said Cyrenius Beers hereinafter contained, the prompt and faithful performance whereof is a condition precedent hereto, and, time being the essence of this contract, doth hereby extend and postpone the time of payment of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned until the twenty-fourth day of February which will be in the year of our Lord one thousand

139 eight hundred and seventy-nine, interest to be paid thereon at and after the rate of nine per centum per annum, half-yearly, in the same manner and at the place or places in the condition of said bond mentioned; and the said Cyrenius Beers, in consideration of such extension of the time of payment of said principal sum, doth hereby covenant, promise, and agree to and with said The Connecticut Mutual Life-Insurance Company, its successors and assigns, that he will well and truly pay the said The Connecticut Mutual Life-Insurance Company, its successors and assigns, said principal sum of twenty thousand ($20,000) dollars on the

twenty-fourth day of February which will be in the year of our Lord one thousand eight hundred and seventy-nine, at the place in the condition of said bond mentioned, and also interest thereon, at the rate of nine per centum per annum, half-yearly, to wit, on the twenty-fourth day of each of the months of August and February which will be in each and every year during such extended time of payment, according to the tenor and effect of the ten (10) coupons or due-bills as signed by said Cyrenius
140 Beers bearing even date and given herewith, it being expressly understood and agreed by and between the parties hereto that in the event of a failure to pay either or any of said coupons at maturity, then at the election of said The Connecticut Mutual Life-Insurance Company, its successors or assigns, the whole of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all arrearages of interest thereon, in the same manner as if said extension had never been granted.

It is further expressly understood by and between the parties hereto that nothing herein contained shall operate to discharge or release the said Cyrenius Beers, his heirs, executors, or administrators, from their liabilities upon said bond, but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond.

141 It is also expressly understood and agreed by and between the parties hereto that in the event of a failure on the part of the said Cyrenius Beers, his heirs, legal representatives, and assigns, to fulfill, keep, and promptly perform as well in spirit as in letter the covenants in the said mortgage contained, given by said Cyrenius Beers to said company, then at the election of said The Connecticut Mutual Life-Insurance Company, its successors or assigns, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything hereinbefore contained to the contrary notwithstanding.

In witness whereof the said parties to these presents have hereto set their hands and seals the day and year first above written.

CYRENIUS BEERS. [SEAL.]
[SEAL.]

(Endorsed:) Filed Nov. 3, 1879. Wm. H. Bradley, cl'k.

142 Afterwards, to wit, on the 1st day of December, A. D. 1879, in the record of the proceedings of said court in said entitled cause before the honorable Henry W. Blodgett, district judge, is the following entry, to wit:

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
CHARLES G. BEERS ET AL. } In chancery.

And now comes the said complainant, by Messrs. Isham and Lincoln,

its solicitors, and upon their motion, due notice having been given and proper cause in that behalf having been shown, it is ordered that
143 Henry P. Isham be, and he is hereby, appointed receiver of the land and premises described in the bill of complaint in this cause, known and described as follows, to wit, all that certain lot, piece, or parcel of land situate, lying and being in the city of Chicago, in the county of Cook, and State of Illinois, known and described as being a part of lots number (4) and five (5), in block number eight (8), in Fort Dearborn addition to Chicago, butted and bounded as follows, to wit, commencing at a point on the north line of said lots fourteen (14) feet east from the northwest corner of said lot four (4), running thence east twenty-seven (27) feet, thence south one hundred and forty (140) feet to the alley on the south line of said lots, thence west along such south line twenty-seven (27) feet, thence north one hundred and forty (140) feet to place of beginning, being the west eighteen (18) feet and four (4) inches of said lot five (5), and the east eight (8) feet and eight inches of said lot four, and of the rents, issues, and profits thereof. And it is further ordered that the tenants in possession or occupancy of said premises or any part thereof do attorn and pay their rents in arrear and rents to become due to said Henry P. Isham as such receiver, and that said receiver have power to distrain for such rents or any part thereof, and to collect the same by process of law, and to employ counsel, if necessary, in the premises.
144 And it is further ordered that said receiver have power to lease the said premises in such parcels to such persons and upon such terms as he may deem for the best interest of all the parties in this cause; and that said receiver, out of the rents to be collected by him from said premises, be at liberty to pay the taxes, assessments, and water rates upon said premises or any part thereof, as well those which have accrued as those which shall accrue during the term of his said receivership, and to redeem said premises or any part thereof from any sales or forfeitures for taxes thereon, and to insure the building or buildings situated upon said premises from loss or damage by fire, and to make any reasonable and proper repairs thereof. And said receiver is hereby directed to present his accounts from time to time to the court for its approval and to pay his balances to the clerk of this court to the credit of this cause. And it is further ordered that said receiver file herein his bond, with surety to be approved by the court, in the penal sum of fifteen hundred dollars conditioned upon the faithful performance of his office of receiver. And liberty is reserved to all the parties to apply to the court for such other or further order in the premises as occasion may require.

145 Afterwards, to wit, on the 19th day of December, A. D. 1879, in the record of the proceedings of said court in said entitled cause before the honorable Henry W. Blodgett, district judge, is the following entry, to wit:

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
CHARLES G. BEERS ET AL. } In chancery.

On motion, leave is given complainant to file replication to the answer

of Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, nunc pro tunc as of the first day of December instant.

On the same day, to wit, the 19th day of December, A. D. 1879, said complainant, by its solicitors, filed in said clerk's office its replication to the answer of Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, which said replication is in the words and figures following, to wit:

Replication to answer of Charles G. Beers et al.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois. In chancery. Gen. No. 16224. Term No. 1487.

146 The replication of the Connecticut Mutual Life-Insurance Company, complainant, to the joint and several answer of Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that it does and will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

ISHAM AND LINCOLN,
Solicitors for Complainant.

(Endorsed:) Filed this 19th day of Dec., 1879, as of Dec. 1, 1879. Wm. H. Bradley, clerk.

147 Afterwards, to wit, on the 2d day of March, A. D. 1880, said complainant, by its solicitors, filed in said clerk's office its demurrer to the cross-bill of Mary C. Foster and Rissa J. Beers in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer of complainant to cross-bill of Mary C. Foster and Rissa J. Beers.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois. In chancery.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
CHARLES G. BEERS AND OTHERS. } Original bill.

MARY C. FOSTER AND RISSA J. BEERS
v.
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company and others. } Cross-bill.

The demurrer of the Connecticut Mutual Life-Insurance Company, defendant, to the cross-bill of complaint of Mary C. Foster and Rissa J. Beers, cross-complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said cross-bill of complain tcon-
148 tained to be true insuch manner and form as the same are therein set forth and alleged, doth demur to the said cross-bill, and for cause of demurrer showeth that the said cross-complainants have not in and by their said cross-bill made or stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed for from or against this defendant.

Wherefore and for divers other good causes of demurrer appearing in the said cross-bill this defendant doth demur thereto, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said cross-bill, and humbly prays to be thence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

ISHAM AND LINCOLN,
Solicitors for the Connecticut Mutual Life Insurance Company, Defendant.

I, Robert T. Lincoln, do hereby certify that I am of counsel to the abovenamed defendant, the Connecticut Mutual Life Insurance Company, and that in my opinion the foregoing demurrer is well founded in point of law.

ROBERT T. LINCOLN.

The affidavit required by the thirty-first rule of the rules of practice of the courts of equity of the United States is hereby waived.

HERBERT, QUICK AND MILLER,
149 *Solicitors for Mary C. Foster and Rissa J. Beers, Cross-complainants.*

(Endorsed:) Filed March 2, 1880. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 23rd day of March, A. D. 1880, said Henry W. Bishop, the master in chancery to whom this cause was referred, filed in said clerk's office his report in said entitled cause, which said report is in the words and figures following, to wit:

Master's report.

150 In the circuit court of the United States for the northern district of Illinois. In chancery.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company *v.* CHARLES G. BEERS, RISSA J. BEERS, MARY C. Foster, Orrington C. Foster, Andrew Brown, Samuel Barnum, Stephen Barnum, and William Gribbon.	16224, 1488. Master's report.

To the honorable the judges of the said court:

The above-entitled cause having been referred to me as master in chancery of the said court by an order of said court, entered herein on the 18th day of March, A. D. 1880, I do hereby report that having notified the parties interested that a hearing for the purposes in said order expressed would be had before me, at my office in Chicago, on the 18th day of March, A. D. 1880, I was attended on that day by Mr. J. Mulvey and Mr. Isham, of counsel
151 for said complainant, who produced in evidence before me the bill of complaint herein, and a memorandum of agreement with five (5) interest coupons attached, each dated the 24th day of February, A. D. 1874, from Cyrenius Beers unto the Connecticut Mutual Life-Insurance Company; also a mortgage dated the 24th day of February, A. D. 1869, made between Cyrenius Beers and Mary Beers, his wife, parties of the first part, and the Connecticut Mutual Life-Insurance Company, party of the second part (being the agreement, coupons, and mortgage referred to and described in said bill of complaint).

I was also attended on the said 18th day of March, A. D. 1880, by Messrs. Herbert, Quick and Miller, of counsel for defendants, and also by James S. Hubbard and Anson Sperry, each of whom testified herein, and their testimony was duly taken, is hereto annexed, and made a part hereof.

I was again attended (by adjournment), on the 22nd day of March, A. D. 1880, by said counsel and by said Anson Sperry and Charles G. Beers, each of whom testified herein, and their testimony was duly
152 taken, is hereto annexed, and made a part hereof.

I further report that from an examination of said bill of complaint, agreement, mortgage, and testimony so produced in evidence before me; and from a computation made by me, I find there is due and owing to said complainant the sum of twenty thousand dollars for the principal and nineteen hundred and fifteen dollars for interest thereon from the twenty-fourth day of February, A. D. 1879, to the eighteenth day of March, A. D. 1880 (making a total of $21,915.00).

And the sum of forty-five hundred dollars for five (5) overdue and un-

paid interest coupons, and five hundred and fifty-seven dollars and twenty-five cents for interest on said coupons from their maturity to said eighteenth day of March, A. D. 1880 (making a total of $5,057.25).

The entire amount of principal and interest to said March, 1880, on said agreement and coupons secured by said mortgage being twenty-six thousand nine hundred seventy-two dollars and twenty-five cents ($26,972.25).

153 And the further sum of one hundred and fifty dollars for payments shown to have been made on behalf of said complainant, and fourteen dollars and twenty-six cents ($14.26) for interest thereon to said eighteenth day of March, A. D. 1880, for payments for insurance premiums on the buildings on said premises (making a total of $144.26).

The entire amount of principal, premiums for insurance, and interest on each to said 18th March, 1880, on said agreement and coupons secured by said mortgage and the covenants therein contained being twenty-seven thousand and one hundred and sixteen dollars and 51 cents ($27,116.51).

I return all the documents used by me in preparing this report, and make the same a part hereof.

Respectfully submitted.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, March 22, 1880.

154 In the circuit court of the United States for the northern district of Illinois. In chancery.

CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY, complainant, v. CHARLES G. BEERS ET AL., DEFENDANTS.	16224, 1487.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 18th day of March, A. D.* 1880.

Present, Mulvey and Isham & Lincoln for complainant, and Herbert, Quick and Miller for defendants.

JAMES S. HUBBARD, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. MULVEY, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. James S. Hubbard; age, thirty-four; occupation, clerk for Moore and James, fire-insurance agents.

Q. What relations have Moore and James to the complainants?

155 A. They are agents for the Connecticut Mutual Life-Insurance Company as custodians of their policies of insurance for collateral to their loans, and as such have to see that their property is covered by insurance.

Q. This, Mr. Hubbard, is a suit for the foreclosure of a mortgage for the premises known as number 73 South Water street. Do you know

whether any, and, if so, how much, insurance has been effected by the firm of Moore and James on behalf of the complainant?

(Objected to as immaterial.)

A. August 13, 1878, we effected an insurance of $10,000.00 on the property and the Connecticut Mutual Life-Insurance Company paid the premium of $65.00 on the same. August 13, 1879, we effected an insurance of $10,000.00 on the building 73 South Water street, for which the Connecticut Mutual paid the premium of $65.00. Each of these insurances was for the term of one year.

Q. Are those all the items of insurance you know about?

A. Yes, sir

Mr. MILLER:

156 Q. In whose name were those policies written?

A. The Connecticut Mutual Life-Insurance Company.

Q. As mortgagee or as owner, or how?

A. Well, I presume as mortgagee; we had a clause in the policy stating what their interest in the policy was.

Q. Whether as mortgagee or owner?

A. Yes, sir.

Q. That would be the only place in the policy probably where that fact would appear?

A. It stated that the company had an interest as mortgagee, and it protects such interest either way it is.

JAMES S. HUBBARD.

Subscribed and sworn to before me this 18th day of March, 1880.

H. W. BISHOP,

Master in Chancery of U. States Circuit Court, Northern District of Illinois.

Mr. Mulvey now introduced in evidence on behalf of the complainant a duly certified copy from the probate court of Cook County of the final account and prayer for discharge of Cyrenius Beers as executor
157 of the last will and testament of Mary Beers, deceased, and of the agreement and consent attached thereto by Mary B. Foster, Rissa J. Beers, and Charles G. Beers, that the said account might be approved and that they were satisfied with the same, and of the approval of said account. And it is stipulated by the parties the agreement or account the copy whereof is above mentioned was actually filed in said probate court in connection with said account and was signed by said parties, Mary B. Foster, Rissa J. Beers, and Charles G. Beers, as shown by said copy.

It is agreed that the joint and several plea of Mary C. Foster, Rissa J. Beers, and Charles G. Beers, filed herein May 5, 1879, may be read in evidence on the hearing hereof as the testimony upon the facts therein contained of said Mary C. Foster, Rissa J. Beers, and Charles G.
158 Beers, with the like effect as if the same were herein duly taken to said facts.

It is further agreed that the inventory of the estate of said Mary Beers was filed in the county court of Cook County, Illinois, on the 26th

day of March, 1872, and that the premises in the bill of complaint described were inventoried and accounted for in said inventory.

ISHAM AND LINCOLN,
Complainant's Solicitors.
HERBERT, QUICK AND MILLER,
Sol'rs for Def'ts Beers, Foster, and Brown.

159 In the circuit court of the United States for the northern district of Illinois. In chancery.

CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY, complainant,
v.
CHARLES G. BEERS ET AL., DEFENDANTS. } 16224, 1487.

Testimony taken before Henry W. Bishop, master in chancery of said court.

THURSDAY, *the 18th day of March*, 1880.

Present, Mr. J. Mulvey and Messrs. Isham and Lincoln for complainant, and Messrs. Herbert, Quick and Miller for defendants.

ANSON SPERRY, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. Mulvey, and deposes and says as follows:

Int. 1. Please state your name.

Ans. Anson Sperry.

Q. What is your connection, Mr. Sperry, with the complainants?

A. I have no direct connection with the complainants. I am
160 doing the business here of Judge Skinner in the city of Chicago, and his business is the superintendence of the financial matters of the Connecticut Mutual Life-Insurance Company in Chicago.

Q. Do you know of the circumstances attending the making of this loan?

A. I know at the time the loan was made to Cyrenius and Mary Beers and then of the undertaking afterwards by Mr. Beers in this agreement for an extension. I drew up the mortgage and this agreement for an extension.

Q. Have you made a computation of the amount that is due upon it?

A. Yes, sir; I have.

(Papers referred to are offered in evidence.)

A. There appears to be interest in arrear from the 24th day of August, 1876, to this date, March 18, 1880. That would be three years and a half. I make the full amount of principal and interest due at this date $26,972.25.

Mr. MILLER:

Q. You computed that on those papers, on the $20,000.00
161 principal, and the interest is computed on the coupons attached to the agreement of extension?

A. Yes, sir; at six per cent. from maturity to this date.

Q. And interest is made up then on the——

A. Is made up of 64.15 interest on the principal sum, and of interest on the five unpaid coupons from their respective maturity.

Q. That is the amount of the coupons?

A. Well, the coupons and the interest after maturity, which was in February, 1879; $64.15 is made up of the five coupons attached to the agreement of extension, and the balance is made up of interest on the coupons and the interest on the principal since the maturity of the last coupon.

Q. Since the 24th of February, 1879?

A. Yes, sir; there was attached to this agreement of extension five coupons of $900.00 each, making $4,500.00, and then there was the interest installment which became due in August, 1879, and then again in February, 1880, which would be $1,800.00, and then interest on
162 $20,000.00 from the 24th day of February to the 18th day of March, to-day, which is $115.00, and then the interest at six per cent. on these five coupons that are attached here, from their maturity up to this date, makes $557.25, making a sum total of $26,972.25.

Mr. MULVEY;

Q. I will next introduce a receipt for certain moneys therein specified, and ask you if you know anything about it.

A. Yes, sir; that is one I drew up myself for Mr. Beers to sign at the time it purports to be—the 8th day of November, 1878. This is his paper.

Q. Did he sign it?

A. He signed it there in my presence.

Q. And that is his signature?

A. That is his signature; yes, sir.

Q. This receipt purports to be for certain money collected upon policies of insurance upon the mortgaged premises; do you know the circumstances connected with this transaction?

A. I do.

Q. Please state them.

A. After the fire Mr. Beers said he should want the insurance
163 money to rebuild with. The Connecticut Mutual Life-Insurance Company were at that time refunding the money or permitting it to be used in the reconstruction of the buildings. There were two ways which they adopted in having that done: one was to deposit the money here to the credit of the one who had met the loss, to be drawn out from time to time to be paid in the construction of the building; and the other was for the parties to go on and make arrangements and build his building, get it up, and then ask for his money, and use it for that purpose—to pay for the cost. Mr. Beers, at the time this insurance was procured from the company, stated that he should want the money to rebuild with, and in remitting the draft to the company I so notified the company, that Mr. Beers would ask the money to be refunded for that purpose. After
he had got his building erected he came in, made his request, which
164 was sent forward to the company, and the insurance was returned, and when I handed it to him I took his receipt, which he signed.

Q. Do you know how this money was kept during the time?

A. It was kept on deposit there in the bank at Hartford, drawing a small rate of interest.

Q. As a special deposit?

A. As a special deposit, so I understood. I was so advised by them. I so understood from the company.

Q. When it was repaid to Mr. Beers it was repaid with the interest?

A. It was repaid with the interest. The interest which accrued was paid to Mr. Beers with the principal sum.

Q. Did he keep it there on special deposit merely as a further security for this loan until the premises should be again improved?

A. It was kept there for the purpose of holding it for the refunding towards the payment of the restoration of the building and its payment. They hadn't given it here to Mr. Beers and let him take it and use
165 it in the reconstruction.

Q. By the terms of this mortgage, Mr. Sperry, the company, the mortgagee, had the right to collect this money on these insurance policies or to allow Mr. Beers to take the money to rebuild with in accordance with the provision of the mortgage; did they allow Mr. Beers this money on rebuilding credit?

A. They did; they allowed it under this provision of the mortgage which permitted them to abandon the insurance to him for the purpose of putting up the building—improving it.

Q. The signature to that extension bond you know to be Mr. Beers'?

A. Yes, sir.

Q. And also to this mortgage?

A. Yes, sir.

Q. Also the signature to each of the coupons remaining uncanceled?

A. Yes, sir; he signed them there. The names on that extension agreement and the receipt were put there by Mr. Beers in my office in my presence.

Mr. MILLER:

Did the company collect this insurance money that you have testified to?

166 A. It was collected in this way: the policies of insurance being made "loss, if any, payable to the Connecticut Mutual Life-Insurance Company," the insurance companies made the drafts payable to the Connecticut Mutual.

Q. The insurance companies in which the policies were on the building?

A. Yes, sir.

Q. Those drafts made payable to the Connecticut Mutual Life-Insurance Company, to whom were they delivered?

A. I don't remember whether they delivered them to me or whether Mr. Beers brought them in and delivered them to me. I think it is very possible that I might have gone and got them myself, because of the vast amount of insurance that was coming in at that time I used to go around to these companies and collect them in—get in these drafts and send them on to the company, with such directions and such understanding as was made with the parties. But from the fact that policies ran "loss, if any, payable to the Mutual Life-Insurance Company," the fire-insurance
167 companies insisted upon making drafts payable to them, and then, of course, they had to go on to Hartford to be endorsed for reassignment.

Q. In whose name were the moneys deposited in Hartford?

A. That I don't know.

Q. How did the moneys get into the hands of Mr. Beers?

A. They were sent back to Judge Skinner's office.

Q. By whom?

A. By the Connecticut Mutual Life-Insurance Company, and by me delivered to Mr. Beers.

Q. Who adjusted the loss with the insurance companies, the Connecticut Mutual or Mr. Beers, or both?

A. Mr. Beers, I think, entirely. I know the Connecticut Mutual did not. The impression on my mind is that Mr. Beers brought in the drafts; got them from the insurance companies and brought them in.

Q. The amount of policies on this property at the time of the fire which had been assigned to the Connecticut Mutual Life-Insurance Company was some $20,000.00, was it not?

A. Yes, sir.

168 Q. Who adjusted the amount fixed upon with the debtor insurance companies?

A. That, as I said before, I don't know who adjusted. I know the Connecticut Mutual did not. But in all these cases the losses were total, and the proofs were made out by the parties suffering the loss; that is, the borrowers of the money. The proofs were made out by them, and all of the negotiations of the settlement as to the amounts were made by them, also with the fire-insurance companies. They did all the business. We never did any of it.

Q. Did you deliver up your policies until you got your drafts?

A. I don't remember how that was.

Q. What was your custom in that regard?

A. The custom was to deliver them when the drafts were given.

Q. Probably that was the custom in this case?

A. I presume so.

ANSON SPERRY.

169 MARCH 21, 1880.

ANSON SPERRY was recalled; same counsel present as before.

Mr. MILLER:

Q. There were ten coupons given with agreement of extension by Cyrenius Beers, similar in amount and terms to the five now attached to the agreement of extension, except as to the time of payment, were there not?

A. Yes, sir; there were.

Q. What became of the other five?

A. I suppose they must have been taken up by Mr. Beers as they matured from time to time.

Mr. BURRY:

Q. Mr. Sperry, the memorandum of agreement which you have testified about in this case is the one that has been offered in evidence?

A. It is.

Q. That is the only one that was made?

A. Yes, sir.

Q. And it was not signed by the company?

A. No.

Q. What was the agreement of extension taken for—for what purpose?

170 (Objected to as incompetent and immaterial.)

A. It was taken as collateral to the original loan.

Q. Was it in any way intended as a substitution?

(Objected to as before.)

A. It was not.

ANSON SPERRY.

Subscribed and sworn to before me this 22nd day of March, 1880.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the U. States for the Northern District of Illinois.

171 In the circuit court of the United States for the northern district of Illinois.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company, complainant, v. CHARLES G. BEERS ET AL., DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court.

MONDAY, *the 22nd day of March, A. D.* 1880.

Present, Herbert, Quick and Miller for the defendants, and Isham and Lincoln for complainant.

CHARLES G. BEERS, a witness on behalf of the complainant [?], being first duly sworn, was examined in chief by Mr. Miller, and deposes and says as follows:

Int. 1. You are one of the defendants, Charles G. Beers?

A. I am.

Q. You may state whether the defendants, or any of them, received any portion of the moneys collected on the policies of insurance on

172 the property described in the bill in this case from the estate of your mother.

A. No, sir.

Q. It is alleged in the bill that some $12,000 or thereabouts of money came into the hands of Cyrenius Beers, as executor of Mary Beers, and that this money or some portion of it came into the hands of the defendants, or some of them; will you state whether such money, or any portion of it, or any money whatever, was received by the defendants, or any of them, from the estate of your mother?

A. No, sir.

Cross-examination waived.

CHARLES G. BEERS.

Subscribed and sworn to before me this 22nd day of March, A. D. 1880.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

173 It is stipulated that letters testamentory were issued to Cyrenius Beers from the county court of Cook County on the 26th day of March, 1872, in the estate of Mary Beers, deceased; that he qualified as such executor; that the June term, 1872, was fixed upon for the presentation of claims against said estate and due notice thereof given; that the only claim presented was the claim of Waite and Clark, attorneys, for one hundred dollars, which was allowed to be paid by the executor; that the estate was adjudicated June 3, 1872, at said June term of said court; that no claims other than the one named were presented and allowed against said estate by the court; and that the final account and petition for discharge of said Cyrenius Beers as executor was presented to the county court of Cook County on the 20th of September, A. D. 1877, approved in open court, and the executor discharged and the estate settled.

ISHAM AND LINCOLN,
Complainant's Solicitors.
HERBERT, QUICK AND MILLER,
Sol'rs for Def'ts Beers, Fosters, and Brown.

174 This indenture, made this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, between Cyrenius Beers and Mary Beers, his wife, of the city of Chicago, in the county of Cook and State of Illinois, parties of the first part, and the Connecticut Mutual Life Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, in the State of Connecticut, party of the second part:

Whereas the said Cyrenius Beers is justly indebted unto the said party of the second part in the sum of twenty thousand ($20,000) dollars, lawful money of the United States of America, an actual loan of money this day made by said party of the second part to the said Cyrenius Beers, at the city of Chicago, in conformity to and under and to be construed by the laws of the State of Illinois, secured to be paid by the certain bond or obligation of the said Cyrenius Beers, bearing even date herewith, in the penal sum of forty thousand ($40,000) dollars, conditioned for the
175 payment unto the above-named party of the second part, its successors or assigns, of the principal sum of twenty thousand ($20,000) dollars, on the twenty-fourth day of February which will be in the year of our Lord one thousand eight hundred and seventy-four, with interest for the same, to be computed from the day of the date thereof, at and after the rate of eight per centum per annum, which said interest shall be paid half-yearly, to wit, on the 24th day of each of the months of August and February which will be in each and every year, until the said principal sum shall be fully paid; which said interest payments, until the said principal sum shall become due, are specified in and further secured by ten (10) coupons given therewith; and the said payments, both of principal and interest, shall be made at such place in the city of New York as the said The Connecticut Mutual Life Insurance Company, its successors or assigns, may from time to time, in writing, appoint, and in default of such appointment then at the office of the said The Connecticut Mutual Life Insurance Company, in the city of Hartford, in the State of Connect-
176 icut, with a proviso thereunder written, whereby it is expressly agreed and fully understood that if default be made in the payment

of any of the interest on the principal sum above mentioned, payable half-yearly as aforesaid, and any portion thereof shall remain due and unpaid for the space of thirty days after the same shall become due and payable according to the above condition, then and in that case the principal sum above mentioned, together with all arrearages of interest thereon, shall, at the option of the said The Connecticut Mutual Life Insurance Company, its successors or assignes, thereupon become due and payable, and shall be collectible, without notice, immediately or at any time after any such default, anything thereinbefore contained to the contrary notwithstanding, as by the said bond and the condition thereof, and the proviso thereunder written, reference being thereto had, may more fully appear:

Now, therefore, this indenture witnesseth that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of said bond, with interest thereon
177 according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part, its successors and assigns forever, all that certain lot, piece, or parcel of land, situate, lying, and being in the city of Chicago, in the county of Cook and State of Illinois, known and described as being a part of lots number four (4) and five (5), in block number eight (8), in Fort Dearborn addition to Chicago, butted and bounded as follows, to wit: Commencing at a point on the north line of said lots fourteen (14) feet east from the northwest corner of said lot four (4), running thence east twenty-seven (27) feet, thence south one hundred and forty (140) feet to the alley on the south line of said lots, thence west along such south line twenty-seven (27) feet, thence
178 north one hundred and forty (140) feet to place of beginning, being the west eighteen (18) feet and four (4) inches of said lot five (5), and the east eight (8) feet and eight inches of said lot four; the title to said premises being in the said Mary Beers, wife of the said Cyrenius Beers; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same, and every part and parcel thereof, with the appurtenances.

[U. S. revenue stamps, $20.00.]

To have and to hold the above-granted bargained and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns forever.

Provided always, and these presents are upon this express condition nevertheless, that if the said parties of the first part, their heirs,
179 executors, or administrators, shall and do well and truly pay or cause to be paid unto the said party of the second part, its successors or assigns, the said principal sum of money mentioned in the condition of said bond and the interest thereon at the time and times respect-

ively, and in the manner mentioned in the condition of said bond, according to the true intent and meaning thereof, and shall and do promptly and faithfully fulfill and perform all the covenants and agreements hereinafter mentioned, that then and from thenceforth these presents and the estate hereby granted shall cease, determine, and be utterly null and void, anything hereinbefore contained to the contrary notwithstanding.

And the said Cyrenius Beers, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree to and with the said party of the second part, its successors and assigns, that he will well and truly pay unto the said party of the second part, its successors or assigns, the said principal sum *of* mentioned in the condition of said bond,
180 and the interest thereon according to the said condition, and also that he will not at any time hereafter, until the said principal sum and the interest thereon shall be fully paid, suffer said premises, or any portion thereof, to be sold for any tax or assessment whatsoever, nor will he do or permit to be done to, in, upon, or about said premises anything that may in any wise tend to impair the value thereof, or to weaken, diminish, or impair the security intended to be effected under and by virtue of this instrument. And in the event that said party of the second part, its successors or assigns, shall expend any money either to save said premises or any part thereof from any sale for taxes or assessments, or to redeem the same from any such sale, or to protect the title or possession of said premises, then all such money so expended shall be a new and additional principal sum of money secured by this instrument, and shall be payable and may be collected immediately or at any time thereafter, with interest thereon at the rate of ten per centum per annum from the time of so paying the same.

181 And, further, that he, his heirs, executors, and administrators, shall and will at all times hereafter, until said principal sum of money and all arrearages of interest thereon shall be fully paid, keep all the buildings (outhouses excepted) now situate or that may hereafter be erected upon said premises fully insured against loss or damage by fire in some good and responsible insurance company or companies satisfactory to the said party of the second part, its successors or assigns, or its or their authorized agent, in the fair ensurable value of such buildings, and will legally and properly assign and deliver to the said party of the second part, its successors or assigns, each, all, and every the policies of insurance therefor as soon as and whenever such insurance shall be effected, and will also deliver to said party of the second part, its successors or assigns, or its or their authorized agent, all premium or renewal certificates received for the payment of the premium upon such policy or policies of insurance as soon as and whenever such certificates shall be issued; and in de-
182 fault of so doing the said party of the second part, its successors or assigns, at its or their option, may effect such insurance in its or their name or names, or otherwise, and the premium money paid therefor shall be a charge upon said premises, and shall be secured by this instrument in the same manner as the said principal sum of money above mentioned is secured; and such premium money shall be paid by said Cyrenius Beers, his heirs and legal representatives, to said party of the second part, its successors or assigns, on demand, and may be collected at any and all times after the same shall have been paid, with interest thereon

at the rate of ten per centum per annum from the time the same shall be advanced; and the said party of the second part, its successors or assigns, shall hold each and all such policies of insurance so received by assignment or otherwise as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all money and sums of money that may at
183 any time become collectible or receivable upon each, all, and every of such policies of insurance, and apply the same when received in the same manner, as far as possible, as is hereinafter provided for in case of a sale of said above-described premises under the power of sale hereinafter contained. But nothing herein contained shall be construed as requiring said party of the second part, its successors or assigns, to incur any expense or make any effort to collect any money that may become due on any such policies of insurance; but if it or they shall elect not to collect the same, they shall make such election within a reasonable time after such money shall become collectible; and on demand of said Cyrenius Beers, or his legal representatives, shall thereupon forthwith, after making such election not to collect, reassign and deliver such policy or policies of insurance to Cyrenius Beers, his executors, administrators, or assigns.

184 But it is hereby expressly agreed and understood by and between the parties to these presents that if default shall be made in the payment of the said principal sum of money above mentioned, or if the interest that may grow due therein, or of any part thereof, at the time and times respectively when the same ought to be paid, as set forth in the said condition of said bond, or if the said Cyrenius Beers, his heirs, executors, or administrators, shall at any time hereafter, until said principal sum and all arreages of interest thereon shall be fully paid, suffer said premises, or any part thereof, to be sold for any tax or assessment whatsoever, or shall do or permit to be done to, in, upon, or about said premises, or any part thereof, anything that may in any wise tend to diminish the value thereof or to impair, weaken, or diminish the security intended to be effected under and by virtue of this instrument, or shall neglect or fail to keep all the buildings (except outhouses) that now are or hereafter may be situate upon
185 said premises fully insured, and the policies of insurance therefor assigned to said party of the second part, its successors or assigns, and delivered to it or them, or its or their authorized agent, together with all premium or renewal certificates received from time to time for the payment of the premium upon such policies, as hereinbefore covenanted and provided, or shall fail in any wise promptly and faithfully to fulfill, keep, and perform, as well in spirit as in letter, all and singular the covenants and agreements contained in these presents, or if either or any of said covenants and agreements shall at any time be broken in any respect whatsoever, that then and from thenceforth it shall be lawful for the said party of the second part, its successors or assigns, either in person or by attorney, to sell and dispose of all and singular the said premises hereby granted or intended so to be, and all benefit and equity of redemption of the said
186 parties of the first part, their heirs or assigns, therein, at public auction, having first given 30 days' notice of the time *of the time* and place of such sale, such sale to be made in the city of Chicago aforesaid, by advertisement in any one of the daily newspapers that may at that time be published in said city of Chicago, personal notice of such sale to said parties of the first part, their heirs, executors, administrators, or assigns, or

any and all persons claiming by, through, or under them, being hereby expressly waived and excused, and either in the name of the said party of the second part, its successors or assigns, or at its or their option, as the attorney of the said parties of the first part for that purpose by these presents duly and irrevocably authorized, constituted, and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee-simple; and all the recitals that may be contained in such deed or deeds setting forth the fact of due notice, advertisement, and sale, and any and all such
187 other facts and statements as may be proper to evidence the legality of such sale and conveyance and that the same had been duly made in all respects so as to meet all the requirements herein contained or arising in law, and as may be necessary to convey a good title, shall be deemed to be true and shall be considered and taken as prima facie evidence of all the facts and matters set forth in such recitals and such deed or deeds, whether made in the name of the said parties of the first part or in the name or names of the said party of the second part, its successors or assign, shall be effectual to pass the title; and out of the money arising from such sale to pay and retain—

First. All the costs, charges, and expenses of such advertisement, sale, and conveyance.

Second. All money and sums of money which said party of the second part, its successors and assigns, may at any time before such sale pay or expend, either to effect any insurance upon said premises as hereinbe-
188 fore provided, or to redeem said above-described premises from any sale or sales for taxes or assessments, or to save the same from such sale, or to protect the title or possession of said premises or any part thereof, with interest on all money so advanced or expended at the rate of ten per centum per annum from the time of so paying or expending the same up to the time of such sale.

Third. All of said principal money and accrued interest thereon that shall at the time of such sale remain unpaid, whether due or not due; and

Fourth. Rendering the overplus of the purchase-money, if any there be, unto the said Mary Beers, her heirs or assigns, on reasonable request; which sale so to be made shall be a perpetual bar, both in law and in equity, against the said parties of the first part, their heirs and assigns, and all other persons claiming or to claim the premises or any part thereof
189 by, from, or under them or any of them.

It is expressly understood and agreed by and between the parties to these presents that in case of a sale of said premises under the power of sale herein-before mentioned, the said party of the second part, its successors, assigns, or attorney, may sell said premises, either in parcels or altogether, as it or they shall see fit, and may also adjourn said sale if it or they shall see fit, from time to time, at its or their discretion.

And the said parties of the first part, for the consideration above mentioned, hereby expressly waive and release all right and benefit which they have in and to said premises, or to which they may be entitled under and by virtue of an act entitled "An act to exempt homesteads from sale or execution," approved February 11th, A. D. 1851, and also an act entitled "An act to amend an act to exempt homesteads from sale on execution,"

approved February 17th, A. D. 1857, as well as any and all
190 other acts of a like character or for a similar purpose.

And the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant, bargain, and agree to and with the said party of the second part, its successors and assigns, that they are well seized of the premises above described as of a good, sure, perfect, absolute and indefeasible estate of inheritence in the land in fee-simple, and have good right, full power and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid, and that the same are free from all other and former grants, mortgages, liens, encumbrances, and tax sales of any and every name, kind, nature, and description whatsoever, and against all and every person or persons lawfully claiming or to claim the whole or any part thereof will warrant and forever defend.

In witness whereof the said parties of the first part have here-
191 unto set their hands and seals, at Chicago aforesaid, the day and year first-above written.

CYRENIUS BEERS. [SEAL.]
MARY BEERS [SEAL.]

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, Reuben Taylor, a notary public in and for the city of Chicago, in the county of Cook and State aforesaid, do hereby certify that Cyrenius Beers and Mary Beers, his wife, who are personally known to me to be the real persons whose names are subscribed to the foregoing instrument in writing, appeared in person before me this day and severally acknowledged that they executed and delivered the same as their free and voluntary act, for for the uses and purposes therein set forth.

And the said Mary Beers, wife of the said Cyrenius Beers, having been by me examined separate and apart from and out of the hearing of her said husband, and the contents and meaning of the said instrument
192 in writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished all her right, title, and interest in and to the lands and tenements therein mentioned, without fear or compulsion of her said husband, and that she does not wish to retract the same.

And I do hereby further certify that at the time of making such examination as aforesaid I fully informed the said Mary Beers of her rights in said premises under and by virtue of the law of the State of Illinois in said instrument referred to relative to the exemption of homesteads from levy and forced sale, and she then upon such examination acknowledged that she voluntarily released and waived all right, benefit, and advantage under said laws, and that she does not wish to retract the same.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at Chicago, this 27th day of February, in the year of our
193 Lord one thousand eight hundred and sixty-seven.

[NOTARIAL SEAL.] REUBEN TAYLOR,
Notary Public.

(Endorsed:) Filed for record in the recorder's office in Cook Co., Ill., on the 27th day of Feb'y, A. D., 1869, and duly recorded in book 94 of mortgages, page 212. Norman T. Gassette, recorder.

194 Memorandum of agreement made and entered into this twenty-fourth day of February, A. D. 1874, by and between the Connecticut Mutual Life-Insurance Company, a corporation subsisting by the laws of the State of Connecticut and located and doing business in the city of Hartford and State of Connecticut, of the one part, and Cyrenius Beers, of the city of Chicago, in the county of Cook and State of Illinois, of the other part.

Whereas the said Cyrenius Beers is justly indebted under the said Connecticut Mutual Life-Insurance Company in the sum of twenty thousand ($20,000) dollars, secured to be paid by the certain bond or obligation in writing of the said Cyrenius Beers, bearing date at Chicago aforesaid, the twenty-fourth day of February, A. D. 1869, in the penal sum of forty thousand ($40,000) dollars, conditioned for the payment under the said company, its successors or assigns, of the principal sum of twenty thousand ($20,000) dollars on the twenty-fourth day of February, A. D. 1874,
195 with interest thereon at the rate of eight per centum per annum, payable half-yearly; and whereas the said principal sum of said bond is still wholly unpaid, and the said Cyrenius Beers, party of the second part hereto, hath applied to said The Connecticut Mutual Life-Insurance Company to extend the time for the payment of said principal sum; and whereas the said Cyrenius Beers and Mary, his wife, executed and delivered their certain indenture of mortgage to said company, bearing even date with said bond, to secure the payment thereof, which said mortgage was duly recorded in the recorder's office of said Cook County:

Now, this memorandum witnesseth that the said The Connecticut Mutual Life-Insurance Company, in consideration of the covenants and agreements on the part of the said Cyrenius Beers hereinafter contained, the prompt and faithful performance whereof is a condition precedent hereto, and time being the essence of this contract, doth hereby extend and postpone the time of payment of said principal sum of twenty thousand
196 ($20,000) dollars in the condition of said bond mentioned until the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, interest to be paid thereon at and after the rate of nine per centum per annum, half-yearly, in the same manner and at the place or places in the condition of said bond mentioned.

And the said Cyrenius Beers, in consideration of such extension of the time of payment of said principal sum, doth hereby covenant, promise, and agree to and with the said The Connecticut Mutual Life-Insurance Company, its successors and assigns, that he will well and truly pay the said The Connecticut Mutual Life-Insurance Company, its successors and assigns, said principal sum of twenty thousand ($20,000) dollars, on the twenty-fourth day of February which will be in the year of our Lord one thousand eight hundred and seventy-nine, at the place in
197 the condition of said bond mentioned, and also interest thereon at the rate of nine per centum per annum half-yearly, to wit, on the twenty-fourth day of each of the months of August and February, which will be in each and every year during such extended time of payment, according to the tenor and effect of the ten (10) coupons or due-bills signed by said Cyrenius Beers, bearing even date and given herewith; it being

expressly understood and agreed by and between the parties hereto that in the event of a failure to pay either or any of said coupons at maturity then, at the election of said The Connecticut Mutual Life-Insurance Company, its successors or assigns, the whole of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all arrearages of interest thereon, in the same manner as if said extension had never been granted.

198 It is further expressly understood by and between the parties hereto that nothing herein contained shall operate to discharge or release the said Cyrenius Beers, his heirs, executors, or administrators, from their liabilities upon said bond, but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond.

It is also expressly understood and agreed by and between the parties hereto that in the event of a failure on the part of the said Cyrenius Beers, his heirs, legal representatives, and assigns, to fulfill, keep, and promptly perform, as well in spirit as in letter, the covenants in the said mortgage contained, given by said Cyrenius Beers to said company, then, at the election of said The Connecticut Mutual Life-Insurance Company, its successors or assigns, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest

199 thereon at said rate of nine per centum per annum, anything herein before contained to the contrary notwithstanding.

In witness whereof the said parties to these presents have hereto set their hands and seals the day and year first-above written.

CYRENIUS BEERS. [SEAL.]

$900.00. Due the Connecticut Mutual Life-Insurance Company, or order, nine hundred dollars, on the 24*th* day of February, A. D. 1879, payable at such place in the city of New York or in the State of New York as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment then at the office of said The Connecticut Mutual Life-Insurance Company, in the city of Hartford, in the State of Connecticut, being for the payment of the half-yearly interest due that day on my bond to said The Connecticut Mutual Life-Insurance Company, of date Febru-

200 ary 24, 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has been conditionally extended to the 24th day of February, A. D. 1879.

CYRENIUS BEERS.

CHICAGO, *February 24th*, 1874.

$900.00. Due the Connecticut Mutual Life-Insurance Company, or order, nine hundred dollars, on the 24th day of August, A. D. 1878, payable at such place in the city of New York, in the State of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment, then at the office of said The Connecticut Mutual Life Insurance Company in the city of Hartford, in the State of Connecticut, being for

the payment of the half-yearly interest due that day on my bond to said The Connecticut Mutual Life-Insurance Company, of date February 24, A. D. 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has been con-
201 ditionally extended to the twenty-fourth day of February, A. D. 1879.

CYRENIUS BEERS.

CHICAGO, *February* 24, 1874.

$900.00. Due the Connecticut Mutual Life-Insurance Company, or order, nine hundred dollars, on the twenty-fourth day of February, A. D. 1878, payable at such place in the city of New York, in the State of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment then at the office of said The Connecticut Mutual Life-Insurance Company, in the city of Hartford, in the State of Connecticut, being for the payment of the half-yearly interest due that day on my bond to said The Connecticut Mutual Life-Insurance Company, of date February 24, A. D. 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has been conditionally extended to the twenty-fourth day of February, A. D. 1879.

CYRENIUS BEERS.

CHICAGO, *February* 24, 1874.

202 $900.00. Due the Connecticut Mutual Life-Insurance Company, or order, nine hundred dollars, on the twenty-fourth day of August, A. D. 1877, payable at such place in the city of New York, in the State of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment then at the office of said The Connecticut Mutual Life Insurance Company, in the city of Hartford, in the State of Connecticut, being for the payment of the half-yearly interest due that day on my bond to said The Connecticut Mutual Life Insurance Company, of date February 24th, 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has been conditionally extended to the twenty-fourth day of February, A. D. 1879.

CYRENIUS BEERS.

CHICAGO, *February* 24, 1874.

$900.00. Due the Connecticut Mutual Life Insurance Company, or order, nine hundred dollars, on the twenty-fourth day of February,
203 A. D. 1877, payable at such place in the city of New York, in the State of New York, as the said The Connecticut Mutual Life-Insurance Company, its successors or assigns, may in writing appoint, and in default of such appointment then at the office of said The Connecticut Mutual LifeI nsurance Company, in the city of Hartford, in the State of Connecticut, being for the payment of the half-yearly interest, due that day on my bond to said The Connecticut Mutual Life Insurance Company, of date February 24, A. D. 1869, conditioned for the payment of $20,000 on the twenty-fourth day of February, A. D. 1874, the payment of which has

been conditionally extended to the twenty-fourth day of February, A. D. 1879.

CYRENIUS BEERS.

CHICAGO, *February* 24, 1874.

204 STATE OF ILLINOIS,
Cook County, ss:

In county court.

To the Hon. M. R. M. Wallace, judge of said court:

The undersigned, executor of the last will and testament of Mary Beers, deceased, respectfully submits to the court this his final account as such executor, and says that letters testamentory were issued to him on the 26th day of March, A. D. 1872; that he qualified as such; that appraisers were duly appointed and report of same filed June 3rd, same year, showing no property subject to appraisement; that the June term, A. D. 1872, was fixed upon for the presentation of claims against said estate; that due notice thereof was given as appears by affidavit of posting and publisher's certificate on file; that the only claim presented was the claim of Waite and Clark, attorneys, for $100.00, which was allowed by the court and paid by the undersigned, as appears from their receipt on file; that the said estate was adjudicated June 3d, 1872; that more than two
205 years have elapsed since the issuing of letters testamentory to him; that no claims other than the one named have been presented or allowed against said estate by the court; that all the costs and expenses incurred in administering upon said estate, amounting in all, including attorney's fees mentioned above, to the amount of one hundred and thirty dollars and eighty cents, have been paid by him; that he hereby charges himself with all the personal property mentioned in the inventory, and interest on the same according to the statute, and makes this his account a receipt therefor; and inasmuch as he is sole legatee in trust under said will, the undersigned prays that the court will approve this his final account and discharge him as such executor.

CYRENIUS BEERS,
Executor of Last Will and Testament of Mary Beers, dec'd.

Dated September 20th, A. D. 1877.

206 RECAPITULATION.

Am't rec'd	$11,570 40
" paid out, vouchers 1 & 2	130 80
Bal	11,439 60

CYRENIUS BEERS.

We, the undersigned, Mary B. Foster, Rissa J. Beers, and Charles G. Beers, sole heirs of Mary Beers, dec'd, do hereby consent that the above account of Cyrenius Beers, executor, &c., may be approved; that we, as heirs of said Mary Beers, are satisfied with the same, and of the acts and

doings of said Cyrenius Beers as such executor, and hereby waive the filing of any other than the above report.

MARY B. FOSTER.
RISSA J. BEERS.
CHAS. G. BEERS.

O. FOSTER, *Witness.*

Approved in open court Sept. 28, 1877.

M. R. M. WALLACE,
Judge of the County Court of Cook County, Illinois.

207 (Endorsed:) County court. Estate of Mary Beers, dec'd. Final account of executor. Filed Sep. 28, 1877. H. Lieb, clerk of the county court of Cook County, Illinois. Recorded doc. rec., vol. 54, page 440. H. Lieb, cl'k.

STATE OF ILLINOIS,
Cook County, ss:

I, Seth F. Hanchett, clerk of the probate court of Cook County, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the final account of Cyrenius Beers as executor of the last will and testament of Mary Beers, deceased, which final account was filed in and approved by the county court of said Cook County on the 28th day of September, A. D. 1877, all of which appears from the records and files of my office.

In witness whereof I have hereunto set my hand and affixed
208 the seal of said probate court, at my office, in the city of Chicago, in said county, this fifth day of March, A. D. 1879.

[SEAL OF PROBATE COURT.] SETH F. HANCHETT,
Clerk of the Probate Court.

Whereas the Connecticut Mutual-Life Insurance Company of Hartford has heretofore loaned to Cyrenius Beers the sum of twenty thousand dollars, which is still unpaid, not yet being due, and to secure the same the said Cyrenius Beers, with Mary Beers, his wife, executed a mortgage on part of lots 4 and 5 in block 8, in Fort Dearborn addition to Chicago, on which was situate a brick store building, which said property was the property of the said Mary Beers, and to further secure the same at the time of the consummation of said loan the following policies in the name of the said Mary Beers, were transferred to said company as collateral security for said loan, to wit, Irving of New York, $5,000; Merchants of Hartford, $5,000; North British, $5,000; Springfield Fire & Marine, $5,000; and Hartford Fire of Hartford, $5,000; and whereas the said Mary Beers, has since said as-
209 signment died, and the said Cyrenius Beers, has been appointed by the probate court of Cook County executor of her estate, and whereas said building was destroyed by fire on the 9th day of October, A. D. 1871; and whereas the said Cyrenius Beers, executor, has applied to said The Connecticut Mutual Life-Insurance Company to abandon to him said insurance under the provisions of the mortgage given to secure said loan, as it has a right thereunder so to do; and whereas the said building has been rebuilt and insurance to the amount of $10,000 has been

brought in duly assigned to said The Connecticut Mutual Life-Insurance Company, and the said company is willing to abandon the same to said Beers; and whereas it heretofore became necessary for said Connecticut Mutual Life-Insurance Company to join with said Beers in receipts to said fire-insurance companies, in order that said insurance might be adjusted for the amounts to be paid on said policies, but said joinder was not for the purpose of collecting and applying the same on said loan, but
210 merely to enable the said Beers to settle with said companies there, being differences on the amount claimed on loss, which said losses were adjusted as follows: Against the—

Irving	8964 20
Merchants of Hartford	964 20
North British	3,214 02
Springfield, F. & M.	3,214 02
Hartford	3,214 02
	811,570 46

which said money was put on deposit to be abandoned to said Beers upon the completion of said building, and the bank where said deposit was made have allowed interest on said money to amount of 888.70:

This is to certify that I have this day received from the said The Connecticut Mutual Life-Insurance Company the sum of 811,659.16, which is received in full of all of said insurance money so collected to be abandoned to him.

Chicago, November 8, 1872.

CYRENIUS BEERS,
Ex'r of the Estate of Mary Beers, deceased.

(Endorsed:) Filed M'ch 23, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the 31st day of March, A. D. 1880, William
211 Gribbon and Samuel Barnum and Stephen Barnum, by their respective solicitors, filed in said clerk's office their appearances and consent to decree in said-entitled cause, which said appearances and consents are respectively in the words and figures following, to wit:

Appearance and consent to decree of William Gribbon et al.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States circuit court, northern district of Illinois.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
vs.
CHARLES G. BEERS AND OTHERS.
} In chancery. Gen. No. 16224.

And now comes William Gribbon, one of the defendants in the above-entitled cause, by McClellan, Tewkesbury and Cummins, his solicitors, and

enters his appearance as a defendant in said cause, and waives service of process and the right to answer in said cause, and consents that the bill of complaint in said cause may be taken as confessed against him, and that a decree of sale may be entered in said cause upon the filing of this appearance.

WM. GRIBBON, *Defendant.*
By McCLELLAN, TEWKESBURY AND CUMMINS,
Sol'rs for said Defendant.

212 (Endorsed:) Filed March 31st, 1880. Wm. H. Bradley, cl'k.

Appearance and consent to decree of Samuel Barnum and Stephen Barnum.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States for the northern district of Illinois. In chancery.

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company
v.
CHARLES G. BEERS, ET AL. } Gen. No. 16224.

We hereby enter the appearance of Samuel Barnum and Stephen Barnum, two of the defendants in the above-entitled cause, and waive our right to answer in said cause, and consent that the original bill of complaint may be taken as confessed by and against them, and that a decree of sale may be entered in said cause according to the prayer of said bill immediately upon the filing of this appearance and consent.

FAIRCHILD AND BLACKMAN,
Sol'rs for Def'ts Barnums.

(Endorsed:) Filed March 31st, 1880. Wm. H. Bradley, clerk.

213 On the same day, to wit, on the 31st day of March, A. D. 1880, in the record of the proceedings of said court in said-entitled cause, before the honorable Charles E. Dyer, district judge, is the following entry, to wit:

THE CONNECTICUT MUTUAL LIFE-INSURANCE Company *v.* CHARLES G. BEERS, RISSA J. BEERS, MARY C. Foster, Orrington C. Foster, Andrew Brown, William Gribbon, Samuel Barnum, and Stephen Barnum,	In chancery. Original bill.
and	
MARY J. FOSTER AND RISSA J. BEERS *v.* THE CONNECTICUT MUTUAL LIFE-INSURANCE Company, Charles G. Beers and Andrew Brown.	Cross-bill.

And now, upon reading and filing the appearances in writing of the

defendants William Gribbon, Samuel Barnum, and Stephen Barnum, and their consent in writing by their respective solicitors that the original bill of complaint in this cause may be taken as confessed by and against them, it is upon such consent ordered, adjudged, and decreed, that the original bill of complaint in this cause be, and the same is hereby, taken as confessed by and against said defendants, William Gribbon, Samuel Barnum, and Stephen Barnum; and now by consent of all parties, the further
214 time for taking testimony being waived here in open court, and this cause being brought on to be heard upon the original bill of complaint taken as confessed by and against said defendants William Gribbon, Samuel Barnum, and Stephen Barnum, and upon the joint and several answer thereto of the defendants Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, and upon the complainant's replication to said answer, and upon the report of Henry W. Bishop, esq., master in chancery of this court, and the depositions, exhibits, and proofs thereto attached, which said report was filed herein on the twenty-third day of March, A. D. 1880, the said defendants who have answered waiving in open court their right to file exceptions to said report, and upon the testimony offered at the hearing, in open court, and upon the cross-bill of complaint of the defendants Mary C. Foster and Rissa J. Beers, and the original complainant's demurrer to said cross-bill, and the court having heard the arguments of counsel, and being now fully advised in the premises, doth find that the equities in this cause are with the original complainant, the Connecticut Mutual Life-Insuance Company, and doth order, adjudge, and decree, that the demurrer of the original complainant to said cross-bill be, and the same is hereby, held good and sufficient, and that said demurrer do stand and be allowed; and it is thereupon ordered, adjudged, and decreed, that the said cross-bill
215 of said defendants Rissa J. Beers and Mary C. Foster do stand dismissed out of this court for want of equity. And the court having read the report of Henry W. Bishop, esq., master in chancery of this court, which report bears date the twenty-second day of March, A. D. 1880, and was made in pursuance of an order of this court heretofore made in this cause referring it to the said master to take proofs in said cause, and to compute the amount due to the complainant upon the bond and coupons, and the mortgage and the covenants therein contained, mentioned, and set forth in said bill of complaint, and which report was filed herein on the twenty-third day of March, A. D. 1880, on reading said report, upon motion of counsel for complainant, no cause to the contrary having been shown, it is ordered, adjudged, and decreed, and this court, by virtue of the authority in it vested, doth order, adjudge, and decree that the said report and all things therein contained do stand ratified and confirmed.

And the court further finds that there is due to the complainant in this cause for interest accrued since the date of said master's report upon the bond and coupons thereto attached, and upon moneys therein mentioned paid for insurance premiums, the sum of seventy-five dollars and twenty-two cents.

And this court, being fully advised in the premises doth find,
216 adjudge, and decree that all the material allegations in the said bill of complaint mentioned have been fully proved, and that there is

at the date of the entry of this decree due to the complainant in this cause the sum of twenty-seven thousand one hundred and ninety-one dollars and seventy-three cents, and that the complainant has a valid and first lien therefor upon the lands and premises hereinafter described, and that the rights and interests of the defendants in this cause in said lands are subject and inferior to the lien of said complainant. It is therefore upon motion of counsel for the complainant ordered, adjudged, and decreed, and this court by virtue of the power and authority in it vested doth order, adjudge, and decree, that unless some of the defendants in this cause pay or cause to be paid to the complainant within five days from the date of the entry of this decree the said sum of twenty-seven thousand one hundred and ninety-one dollars and seventy-three cents, with interest thereon at the rate of six per centum per annum from the date of the entry of this decree to the day of such payment, and in default of so doing that all and singular the said premises mentioned and described in the said bill of complaint and hereinafter described, or so much thereof as may be sufficient to
217 satisfy the amount due the complainant as hereinbefore adjudged, together with interest and the costs of this case, and which may be sold separately without material injury to the parties interested, be sold at public auction to the highest bidder for cash, by Henry W. Bishop, esq., master in chancery of this court. And it is further ordered that he make such sale at the front door of the building wherein this court is held, now called the National Life Building, and known as numbers 157 to 163 La Salle street, in the city of Chicago, in Cook County, Illinois, and that he give public notice of the time and place of holding such sale by publishing an advertisement thereof once a week for three successive weeks in a newspaper published in the city of Chicago, in the county of Cook, and State of Illinois, the first publication of such notice being not less than twenty days previous to the time of such sale; that at such sale the complainant, or any of the parties to this cause, may be the purchaser or purchasers; that the said master shall give to any purchaser at such sale a certificate of sale in pursuance of the law of the State of Illinois concerning the sale of real estate by virtue of a decree of foreclosure of mortgage, and shall cause a duplicate of such certificate to be recorded as required by law.

The premises authorized to be sold under and by virtue of this
218 decree are the following, to wit: all that certain lot, piece, or parcel of land situate, lying, and being in the city of Chicago, in the county of Cook, and State of Illinois, known and described as being a part of lots number four (4) and five (5), in block number eight (8), in Fort Dearborn addition to Chicago, butted and bounded as follows, to wit: commencing at a point on the north line of said lots fourteen (14) feet, east from the northwest corner of said lot four (4), running thence east twenty-seven (27) feet; thence south one hundred and forty (140) feet, to the alley on the south line of said lots; thence west along such south line twenty-seven (27) feet; thence north one hundred and forty (140) feet to place of beginning, being the west eighteen (18) feet and four (4) inches of said lot five (5), and the east eight (8) feet and eight inches of said lot four; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging.

It is further ordered that if the said premises or any parcel thereof shall at such sale be struck off and sold by the master to the complainant in this

cause the complainant shall be required to pay to the master only so much of the complainant's bid as shall, taken together with other moneys paid to the master at such sale on bids for parcels by other persons, if any there be, *be* sufficient to satisfy the expenses of the sale and the
219 master's fees, disbursements, and expenses, and the costs of this suit, and also any excess of the remainder of the amount of said bid, after such payment over the amount due the complainant under this decree for indebtedness secured by said mortgage.

It is further ordered that said master make report to this court of such ssle, and of his acts and doings hereunder, for approval and confirmation and for further direction herein; and that he retain from the moneys received by him on said sale the amount of his fees, disbursements, and commissions thereon, and bring the residue of such moneys, if any, into court to abide the further order of the court, and that he take the receipt of the clerk of this court therefor, and file the same with said report; and if the price for which said premises shall be so sold shall be insufficient to satisfy the amount so found and adjudged to be due to the complainant with the interest thereon and the costs of suit and expenses of sale as aforesaid, that the said master specify the amount of such deficiency in his said report of sale.

And it is further ordered that the clerk of this court hold such moneys so to be paid him by said master, subject to the further order and direction of this court in this cause.

It is further ordered that if any sale made by said master under
220 this decree shall be confirmed by this court, and if the land so sold shall not be redeemed according to the laws of the State of Illinois, the master in chancery of this court shall after the expiration of the time allowed by law for such redemption execute and deliver to the legal holder of any certificate of sale issued under this decree a deed of conveyance of the land in such certificate described, which shall not have been so redeemed.

And it is further ordered, adjudged, and decreed that the defendants in this cause, and all persons claiming by, through, or under them, or either of them, since the filing of the original bill of complaint in this cause, be forever barred and foreclosed from all equity of redemption and claim of, in, and to said above-described land and premises, and any part and parcel thereof which shall be sold as aforesaid under this decree, and which shall not be redeemed according to law.

And it is further ordered, adjudged, and decreed that upon the execution and delivery of the deed or deeds of conveyance as aforesaid, the grantee or grantees, his or their heirs or assigns, be let into possession of the portion of said mortgaged premises so conveyed to him or them, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who since the commencement of this suit has come into possession under them, or either of them, on the pro-
221 duction of said master's deed of conveyance, and of a certified copy of the order of this court confirming the report of said sale, surrender possession thereof to such grantee or grantees, his or their heirs or assigns.

And it is further ordered that the receiver heretofore appointed in this cause continue in the possession of said premises, and in the performance of his duties as such receiver until the further order of this court.

And the said Mary C. Foster and Rissa J. Beers here pray an appeal to the Supreme Court of the United States, which is allowed on their filing a bond in the usual form, with sufficient security, to be approved by this court, in the sum of one thousand dollars, within ten days from the entry of this decree.

And on the same day, to wit, the 31st day of March, A. D. 1880, said defendants, Mary C. Foster and Rissa J. Beers, by their solicitors, filed in said clerk's office their certificate of evidence in said-entitled cause, which said certificate of evidence is in the words and figures following, to wit:

Certificate of evidence.

Circuit court of the United States for the northern district of Illinois. In chancery.

222

The Connecticut Mutual Life-Insurance Company *vs.* Charles G. Beers Rissa J. Beers, Mary C. Foster, Orrington C. Foster, Andrew Brown, Samuel Barnum, Stephen Barnum, and William Gribbon.	Bill.
Rissa J. Beers and Mary C. Foster, *vs.* The Connecticut Mutual Life-Insurance Company.	Cross-bill.

Be it remembered that on the hearing in this court on the issues in said original cause there was offered and read in evidence on behalf of said defendants, Charles G. Beers, Rissa J. Beers, Mary C. Foster, Orrington C. Foster, and Andrew Brown, under the stipulation made and filed herein, the plea heretofore on the fifth day of May, A. D. 1879, filed herein on the part and behalf of said Mary C. Foster, Rissa J. Beers, and Charles G. Beers, the said plea by stipulation of the parties to be taken and to stand of and for the testimony of said Mary C. Foster, Rissa J. Beers and Charles G. Beers to the facts therein averred or stated and to have the same effect as such testimony would have if taken and read herein.

The said defendant', Charles G. Beers, Rissa J. Beers, Mary C. Foster Orrington C. Foster, and Andrew Brown, also offered and read in evidence a certain quit claim deed of the premises in said bill described dated

223 March 1st, 1879, from Charles G. Beers to Mary C. Foster and Rissa J. Beers, which deed was duly acknowledged and is as described in said defendant's answer.

The above evidence, with the evidence and stipulations contained in or attached to the report of Henry W. Bishop, esq., master in chancery heretofore filed herein (which was also offered and read at said hearing), constituted all the evidence read or offered at the said hearing of said cause by or on behalf of any party.

This certificate of evidence is therefore signed and sealed by the judge presiding at such hearing and made a part of the record thereof.

CHAS. E. DYER, *Judge*. [SEAL.]

(Endorsed:) Filed March 31, 1880. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 2d day of April, A. D. 1880, said defendants, Charles G. Beers, Orrington C. Foster, Andrew Brown, William Gribbon, Samuel Barnum, and Stephen Barnum, by their solicitors, filed in said clerk's office their refusal to join in the appeal in said-entitled cause, which said refusal is in the words and figures following, to wit:

Refusal of Charles G. Beers et al to join in appeal.

Circuit court of the United States for the northern district of Illinois.

224 THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY.
vs.
CHARLES G. BEERS, RISSA J. BEERS, MARY C. FOSTER, ORRINGTON C. FOSTER, ANDREW BROWN, WILLIAM GRIBBON, SAMUEL BARNUM, AND STEPHEN BARNUM. } Bill.

MARY C. FOSTER AND RISSA J. BEERS
vs.
THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY. } Cross-bill.

The said defendants, Charles G. Beers, Orrington C. Foster, Andrew Brown, William Gribbon, Samuel Barnum, and Stephen Barnum, having been duly notified in writing to appear and join in an appeal from the decree of this court in the above cause to the Supreme Court of the United States, with said Mary C. Foster, and Rissa J. Beers refuse to join in an appeal from said decree, and said Mary C. Foster and Rissa J. Beers may sever and prosecute an appeal as if summons and severance or other proper proceeding had been had herein.

Dated March 31st, 1880.

C. G. BEERS.
O. C. FOSTER.
ANDREW BROWN.
By HERBERT, QUICK AND MILLER,
His solicitors.

WILLIAM GRIBBON,
By McCLELLAN, TEWKESBURY AND CUMMINS,
His Attorneys.

225 SAMUEL BARNUM.
STEPHEN BARNUM.
By FAIRCHILD AND BLACKMAN,
Their Att'ys.

(Endorsed:) Filed April 2d, 1880. Wm. H. Bradley, clerk.

On the same day, to wit, the 2d day of April, A. D. 1880, in the record of the proceedings of said court in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE CONNECTICUT MUTUAL LIFE INSURANCE Company, *vs.* CHARLES G. BEERS, ET AL.,	In Chancery. Original bil
and	
MARY C. FOSTER AND RISSA J. BEERS *v.* THE CONNECTICUT MUTUAL LIFE-INSURANCE Company.	Cross-bill.

And now come the parties by their solicitors, and it appearing that the said Mary C. Foster and Rissa J. Beers (now Rissa J. Warner) have duly notified in writing the said defendants, Charles G. Beers, Orrington C. Foster, Andrew Brown, William Gribbon, Samuel Barnum, and Stephen Barnum, to appear and join with them in an appeal from the de-
226 cree herein, and the said defendants last named having all appeared and refused to join in said appeal, it is ordered that said Mary C. Foster and Rissa J. Beers (now Rissa J. Warner) be granted such appeal herein as to their own interests. And said Mary C. and Rissa J. having presented their appeal bond in due form with sufficient security, it is ordered that said bond be, and he same is hereby, approved.

227 And on the same day, to wit, the 2d day of April, A. D. 1880, said Rissa J. Beers and Mary C. Foster, by their solicitors, filed in said clerk's office their appeal bond in said-entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Rissa J. Warner, (formerly Rissa J. Beers, now wife of Augustus Warner), and Mary C. Foster, both of the city of Chicago, in the county of Cook and State of Illinois, as principals, and Orrington C. Foster, of the city of Chicago aforesaid, as surety, are held and firmly bound unto the Connecticut Mutual-Life Insurance Company, a corporation subsisting by the laws of the State of Connecticut and located and doing business in the city of Hartford in the State of Connecticut, in the penal sum of one thousand dollars ($1,000) lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and ad-
228 ministrators, jointly, severally, and firmly by these presents. Witness our hands and seals this first day of April, A. D. 1880.

The condition of the above obligation is such that whereas the Connecticut Mutual Life-Insurance Company aforesaid did, on the thirty-first day of March, A. D. 1880, in the circuit court of the United States for the northern district of Illinois, and of the March term thereof, A. D. 1880, recover a decree of foreclosure for the sum of twenty-seven thousand

one hundred and ninety-one dollars and seventy-three cents, besides costs of suit, from which decree of said circuit court of the United States the said Rissa J. Warner (formerly Rissa J. Beers) and Mary C. Foster have prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, if the said Rissa J. Warner (formerly Rissa J. Beers) and Mary C. Foster shall duly prosecute their said appeal with effect, and moreover pay the amount of the costs and damages rendered and to be rendered in case the said decree shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

RISSA J. WARNER. [SEAL.]
MARY C. FOSTER. [SEAL.]
ORRINGTON C. FOSTER. [SEAL.]

Approved.

CHAS. E. DYER, *Judge.*

229 (Endorsed:) Filed April 2d, 1880. Wm. H. Bradley, clerk.

230 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the Connecticut Mutual Life-Insurance Company is the complainant and Charles G. Beers et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 5th day of October, A. D. 1880, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 125. Rissa J. Warner (formerly Rissa J. Beers) and Mary C. Foster, appellants, vs. The Connecticut Mutual Life-Insurance Company. N. Illinois C. C. U. S. Filed 15th October, 1880.

109-357
OFFICE SUPREME COURT U. S.
FILED
NOV 12 1883
JAMES H. McKENNEY, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1883.

No. 125.

RISSA J. WARNER, (formerly) RISSA J. BEERS, and MARY C. FOSTER.
Appellants.

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

QUICK & MILLER,

CHICAGO.

S. W. ROTH LEGAL PRINTER, 171 & 173 RANDOLPH ST.
1883.

one hundred and ninety-one dollars and seventy-three cents, besides costs of suit, from which decree of said circuit court of the United States the said Rissa J. Warner (formerly Rissa J. Beers) and Mary C. Foster have prayed for and obtained an appeal to the Supreme Court of the United States;

Now, therefore, if the said Rissa J. Warner (formerly Rissa J. Beers) and Mary C. Foster shall duly prosecute their said appeal with effect, and moreover pay the amount of the costs and damages rendered and to be rendered in case the said decree shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

RISSA J. WARNER. [SEAL.]
MARY C. FOSTER. [SEAL.]
ORRINGTON C. FOSTER. [SEAL.]

Approved.

CHAS. E. DYER, *Judge*.

229 (Endorsed:) Filed April 2d, 1880. Wm. H. Bradley, clerk.

230 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the Connecticut Mutual Life-Insurance Company is the complainant and Charles G. Beers et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 5th day of October, A. D. 1880, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk*.

(Indorsement on cover:) No. 125. Rissa J. Warner (formerly Rissa J. Beers) and Mary C. Foster, appellants, vs. The Connecticut Mutual Life-Insurance Company. N. Illinois C. C. U. S. Filed 15th October, 1880.

109-357

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IN THE SUPREME COURT

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October Term, A. D. 1883.

No. 125.

RISSA J. WARNER, (formerly) RISSA J. BEERS, and MARY C. FOSTER. *Appellants.*

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY. *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

This is an appeal from the decree of the Circuit Court for the Northern District of Illinois, in favor of appellee upon its original bill of complaint, and dismissing upon demurrer the cross-bill of appellants for want of equity.

The original bill of appellee was filed March 5, 1879, against appellants and others, to establish and foreclose the lien of a mortgage made by MARY BEERS and her husband, CYRENIUS BEERS, to appellee, securing an indebtedness of said CYRENIUS BEERS for $20,000, and covering certain premises in the City of Chicago belonging to said MARY BEERS. The mortgage was dated February 24 1869, and secured the bond of said CYRENIUS BEERS, of even date, payable in five years, and bearing interest

at 8 per cent. MARY BEERS, the owner of the mortgaged premises, died in October following the execution of the mortgage, 1869. She left a will by which she devised all her estate to said CYRENIUS BEERS for his life, with the remainder in fee to her children, said MARY C. FOSTER and RISSA J. BEERS and CHARLES G. BEERS, and by which she also granted to said CYRENIUS BEERS certain powers to incumber or sell. The will is found at page 11 of this brief. This will was duly admitted to probate in the County Court of Cook County, and CYRENIUS BEERS was appointed executor March 26, 1872, and he qualified and acted as such executor and the estate was duly administered according to the statute, and was declared settled, and the executor discharged Sept. 20, 1877. No claim of appellee was presented against said estate. CYRENIUS BEERS paid the interest on said bond until its maturity; and upon its maturity, in February, 1874, said CYRENIUS BEERS and appellee entered into an agreement of extension of the time of payment of said bond for an additional five years, upon the consideration that he should pay interest at the rate of nine per cent., instead of the former rate of eight per cent. (Printed Rec. 67–68). This agreement was carried out, and MR. BEERS gave to the company his 10 coupons for the semi-annual interest at 9 per cent. for the term of the extension; and he subsequently, for two and a half years, paid and took up said coupons as they matured. This extension is alleged in the appellee's bill of complaint (Printed Rec. 4). The agreement of extension will be found at page 19 of this brief. This agreement contains the only evidence in the record of the circumstances under which the extension was negotiated and made.

MARY BEERS, the original surety, had been dead for several years when this extension was made, and her children, MARY C. FOSTER, RISSA J. BEERS and CHARLES

G. BEERS, as devisees, had under her will succeeded to her estate, and to her rights and position as such surety, subject to the life estate of said CYRENIUS BEERS. The extension was entirely without their consent or knowledge. Subsequently, CYRENIUS BEERS died in February, 1878, and CHARLES G. BEERS, one of said devisees, conveyed to his sisters, MARY C. FOSTER and RISSA J. WARNER, his interest in said premises; and by virtue of the will and this deed, and the determination of the life estate of CYRENIUS BEERS, Mrs. FOSTER and Mrs. WARNER are the sole owners of the premises in controversy. We believe there is no controversy at all in the record over the facts – the facts being established either by stipulation or uncontroverted evidence on one side or the other. The sworn plea in bar of appellants [Printed Rec. 20–25,] was by stipulation read in evidence, as their testimony to the facts therein contained, with the same effect as if their testimony were duly taken to said facts. [Printed Rec. 55,77].

This bill to foreclose was filed in 1879, after the five years of the extension had expired, and said MARY C. FOSTER, RISSA J. BEERS (now RISSA J. WARNER) and CHARLES G. BEERS were made defendants. They urged in defense that the said premises of MARY BEERS, which were mortgaged to secure the indebtedness of CYRENUIS BEERS, were released from the lien of said mortgage by the extension of time granted to the debtor, CYRENIUS BEERS. This defense was interposed by plea in bar. (Printed Rec. 20–25). And the case being thereupon set down before Mr. Justice HARLAN upon the sufficiency of this plea, the plea was held insufficient, and was overruled; and the defendants were ruled to answer, with the privilege of interposing the same defense by way of answer. They thereupon answered, setting up the same defense as in their pleas. They also set up the limitation

of the statute of Illinois as to claims against the estate of deceased persons, that the said claim was not presented within two years from the granting of letters testamentary upon the estate of MARY BEERS. The appellants also filed their cross-bill against appellee, setting up the extension and consequent release of the premises from the mortgage lien, and praying that the mortgage be discharged of record, and the premises freed from the cloud thereof. To this cross-bill the appellee interposed a general demurrer.

The hearing resulted in a decree for appellee, for the foreclosure of said mortgage for the amount of the bond secured thereby, with interest after the expiration of the extension at six per cent., and for the amount of the 9 per cent. coupons given with the agreement of extension, with interest thereon after their maturity, amounting in the whole to $27,191.73. The cross-bill of appellants was by the decree dismissed on the demurrer sustained thereto, for want of equity. (Printed Rec. 74–75.)

ERRORS ASSIGNED.

1. The court below erred in the findings of said decree, and each and every of them.

2. The court erred in decreeing said mortgage to be a lien upon the premises therein described; and in decreeing foreclosure thereof, and sale of said premises, to pay the amount found due appellee.

3. The court erred in not holding that said premises were released from the lien and operation of said mortgage, by the extension of the indebtedness of CYRENIUS BEERS secured thereby.

4. The court erred in not decreeing that said claim of appellee was barred as against the estate and property of MARY BEERS, because the same was not presented

within the time limited by the statute of Illinois in such case made and provided.

5. The court erred in overruling the plea of appellants, and in not allowing the same.

6. The court below erred in not dismissing said bill of appellee for want of equity.

7. It was error to sustain the demurrer to the cross-bill of appellants, and to dismiss the same, and not to decree in their favor upon said cross-bill.

8. The court erred in entering the decree entered in this cause.

BRIEF.

The positions which we beg leave to urge on behalf of appellants upon this appeal are briefly these:

I. That MARY BEERS, appellants' mother and testator, in executing the mortgage upon her separate property to secure the indebtedness of CYRENIUS BEERS, occupied the position of a surety; and that appellants, as her devisees, and as the grantee of their brother, the remaining devisee, succeeded to the same position and rights as such surety, and are entitled to every defense which could have availed to their mother, had she lived. *Bank of Albion* v. *Burns*, 46 N. Y. 170; *Smith* v. *Townsend*, 25 N. Y. 479; *Gahn* v. *Niemcewicz*, 11 Wend. 312; S. C., 3 Paige 614; *Johns* v. *Reardon*, 11 Md. 465; *Purvis* v. *Carstaphan*, 73 N. C. 575; *Aguilar* v *Aguilar*, 5 Madd. 414; *Stanford &c. Banking Co.* v. *Bell*, 4 De G., F. & J. 310; *Earl* v. *Countess of Huntingdon*, 2 Bro. P. C. 1; 2 Lead. Cas. in Eq., Part II., 4th Am. from 4th London Ed., 1938, Hare & Wallace's Notes.

II. That by the extension of the time of payment of the bond of CYRENIUS BEERS, upon a valuable consider-

ation, the property of said MARY BEERS and of appellants, her devisees, standing in the relation of surety to said indebtedness, was released from the lien and operation of said mortgage to secure said bond. *Bank of Albion* v. *Burns*, 46 N. Y. 170; *Smith* v. *Townsend*, 25 N. Y. 479; *Gahn* v. *Niemcewicz*, 11 Wend. 312; S. C. 3 Paige, 614; *Purvis* v. *Carstaphan*, 73 N. C. 575.

III. That the will of Mrs. BEERS cannot be successfully appealed to, to prevent this result, or to subject the premises in controversy to appellee's claim, for the following reasons:

1. That by the said will an estate for his own life only was devised to said CYRENIUS BEERS, and a vested remainder in fee was devised to the children of the testatrix, the said MARY C. FOSTER, RISSA J. BEERS and CHARLES G. BEERS. *Doe* v. *Considine*, 6 Wall. 458, 475; 1 Preston on Estates, 70; *Doe* v. *Martin*, 4 Term R. 39; *Lambert* v. *Thwaites*, 2 Law Rep., Eq. Cas., 151, 155; *Minors* v. *Battison*, 1 L. R., H. L. App. Cas., 428.

2. The extension was not authorized by the power in the will. *Ward* v. *Bank of Ky.*, 7 T. B. Mon. 93; *Seitzinger* v. *Weaver*, 1 Rawle, 377; *Horwitz* v. *Norris*, 49 Penn. St. 213; *Slifer* v. *Beates*, 9 S. & R., 166, 181; *Hetzel v. Barber*, 69 N. Y. 12–13.

3. Even if the extension of this mortgage were authorized by the terms of the power in the will, the agreement between CYRENIUS BEERS and appellee for the extension of his bond cannot be referred to the power or be considered as being in any way in execution of such power or intended so to be. It was not done in pursuance of the power, nor does it purport to have been so done. It does not follow the terms of the power. It does not refer to or mention the power, or the property which is the

subject of the power. It alone professes to act on the obligation of CYRENIUS BEERS. It expressly provides that the liability of CYRENIUS BEERS shall not be released thereby, but says nothing about saving the liability of the surety. There is nothing to show that the power was in contemplation in making the extension, or its execution intended. The whole agreement of extension—the whole act of Mr. BEERS—can be referred solely to his own interest—the extension of his own indebtedness. It must then be so referred, and he be considered as having acted therein solely upon his own interest, and not as the donee of the power. 4 Kent Com. *330—*336; *Sir Edward Clere's case*, 6 Coke R. 17 B.; *Andrews* v. *Emmott*, 2 Bro. C. C. 597; *Cox* v. *Chamberlain*, 4 Ves. 631; *Nannock* v. *Horton*, 7 Ves. 391; 1 Sug. Pow. *367, *412; *Denn* v. *Roake* 2 Bing., 497. S. C. 5 B. & C. 720; S. C. 1 Dow & Cl. 437; *Blagge* v. *Miles*, 1 Story R. 426; *Jones* v. *Wood*, 16 Penn. St. 25; *Bell* v. *Twilight*, 22 N. H. 500; 2 Story Eq. Jur. § 1062 a; *Coffing* v. *Taylor*, 16 Ill. 457; *Pease* v. *Pilot Knob Iron Co.*, 49 Mo. 124; *Mory* v. *Michael*, 18 Md. 241; *Maryland Mut. Ben't Society* v. *Clendinen*, 44 Md. 429; *Funk* v. *Eggleston*, 92 Ill., 515; *Towles* v. *Fisher*, 77 N. C. 437; *Blake* v. *Hawkins*, 98 U. S. 315.

4. The intention to execute the power must appear, and must be so apparent and clear that the transaction is not susceptible of any other interpretation. If the act claimed to be in execution of the power can be referred to any other interest, and be operative, and it does not profess to execute the power, it will be so referred to such other interest and not to the power. Every provision of this agreement of extension is operative without referring it to the power; and there is an utter absence of anything to show an intention on Mr. BEERS' part to act under the power.

5. While there is an utter lack of the necessary evidence of an intention to execute the power, there is not wanting evidence of an intention not to execute it:

(1) That the terms of the power were not pursued. It certainly goes to show that an execution of the power was not intended, that the donee of the power did not do that which the power in the will authorized him to do, viz: incumber or sell to raise money.

(2) This act and agreement of extension are expressly and *ex necessitate rei* referable to the interest of Mr. BEERS and not to the power. He necessarily acted with regard to his own interest in procuring the extension of his personal indebtedness; and the extension was only operative as it acted upon his personal interest. The utter silence of the agreement about being in pursuance of the power, while it expressly professes to act upon and in pursuance of his own interest, would seem to us to show that an extension of power was not intended. This is the principal *expressio unius est exclusio alterius.*

6. The power in said will to said CYRENIUS BEERS to incumber or sell is a naked, discretionary power. It is not in any sense a trust for appellee's benefit, or a power in trust, or a power coupled with a trust, or a mixture of trust and power of which appellee can claim or compel the execution for its benefit. Lewin on Trusts, *22, 6th London Ed. 19; 3 Redf. on Wills, 469; Hill on Trustees, *67; 2 Sugd. Powers, 159; *Eldridge* v. *Heard*, 106 Mass. 579.

7. The *estate* of the children and devisees of Mrs. BEERS was not diminished or affected by the existence of the unexecuted power. Nor was the estate of CYRENIUS BEERS enlarged thereby. Nor is the estate of the testatrix charged by her will with the payment of appellee's claim. Nor is the devise to her children a gift of a residue left after appellee's claim has been satisfied out of

her estate, or after raising a fund sufficient for that purpose. The estate of Mr. BEERS was a life estate, and that of the children was a vested remainder in fee. Their estate was never disturbed by the power, because the power was never exercised. The CONNECTICUT MUTUAL LIFE INS. CO. was not a beneficiary under the will, or intended by the testatrix to be an object of her bounty; nor did it gain any rights by the will.

ARGUMENT.

I. THIS IS A CASE OF SURETYSHIP.

The question does not admit of controversy. It is well settled that a wife, who executes a mortgage upon her separate property to secure the debt of her husband, stands in the relation of surety, with all the rights, legal and equitable, and with the benefit of all rules of equity, which are incident to that relation. And appellants, claiming under her as devisees, occupy the same position, and are entitled to the same rights and defenses.

The case of *Bank of Albion* v. *Burns*, 46 N. Y. 170 covers this point completely. In that case the court say:

"The property of the wife having been mortgaged to secure the debt of her husband, she occupied the position of surety, with all the rights, legal and equitable, incident to that relation; and the defendants having succeeded by inheritance to the estate and interest of their mother, occupy the same position, and are entitled to every defense which could have availed to the original mortgagor had she lived." 46 N. Y. 174-5.

To the same effect are the other authorities cited by us to this point, *supra* p. 5. We believe there is no authority which conflicts with this, and that there is no room for controversy about it.

II. THE PREMISES OF ONE, MORTGAGED TO SECURE THE DEBT OF ANOTHER, ARE RELEASED FROM THE LIEN AND OPERATION OF THE MORTGAGE BY THE EXTENSION OF THE TIME OF PAYMENT TO THE DEBTOR.

This extension was made upon a valuable consideration—among other things the payment of a higher rate of interest during the extended time (nine per cent. in place of eight.) It was not an act of indulgence on the part of the creditor to the debtor. The benefits secured to itself by the terms and covenants of the iron-bound contract of extension alone moved appellee to enter into it. There is no room for controversy, and we apprehend counsel for appellee will make none, as to the principal that the property of a feme covert, mortgaged to secure the debt of her husband, or other person, is released by a binding extension of the time of payment without the consent of the surety. The authorities cited by us, *supra* 5, 6, establish this beyond question, if authority is needed.

In *Bank of Albion* v. *Burns*, *supra*, a case precisely in point on this question, the court say:

"The wife, and those claiming under her, are entitled to the benefit of the rules prohibiting all dealings of the creditor with the principal debtor to the prejudice of the surety. An extension of the time of payment, without the assent of the surety, is such a dealing as operates to discharge the surety, the law presuming injury to the surety from such extension." 46 N. Y. 175.

But the learned counsel for the appellee will insist that the will of Mrs. BEERS saves their case; and over the construction of the power and provisions of this will, and over the questions whether the power in the will authorizes this extension, and if it does authorize it, whether the extension is to be referred to the power and is to be regarded as in execution of the power—the whole controversy is centered.

We therefore respectfully invite your Honors' attention to a consideration of the will of Mrs. Beers, which will involve the points on this head stated in this brief, *supra* pp. 6-9.

III. The Will of Mrs. Beers cannot be appealed to by the Connecticut Mutual Life Insurance Company, to prevent the release of her premises by the Extension.

The will is as follows:

I, Mary Beers, wife of Cyrenius Beers, of Chicago, of lawful age and sound mind, in view of the uncertainty of human life, do make, publish and declare this my last will and testament.

First: I order all my debts to be paid, including the expenses of my funeral and last illness.

Second: I give and bequeath to my husband, Cyrenius Beers, all the estate, both real, personal and mixed, of which I die seized or possessed, to be held by him in trust for the following uses, purposes, and trusts, and none other, that is to say, to receive the rents, income, and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers, and Charles G. Beers, share and share alike to them, their heirs and assigns forever.

But, provided that said Cyrenius Beers may incumber the same by way of mortgage or trust deed or otherwise, or renew the same, for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property.

But provided further, that the said Cyrenius Beers may, in his discretion, during his life, sell or dispose of any or all the real estate of which I may die seized or possessed, as though he held an absolute estate in the same, and out of the proceeds pay any of the incumbrances upon any of the property of which I may die seized and possessed, and the remainder over and above what may be required to pay the indebtedness upon said property, the same being now encumbered, to reinvest in such way as he may see proper, and from time to time to sell and re-

invest, such reinvestment to continue to be held in trust, the same as the estate of which I may die possessed; that is to say, the said Cyrenius Beers only to have the use during his life of said estate, with the right of sale and to encumber and reinvest, the remainder after his death to go to my children and their heirs forever.

Third: I hereby appoint said Cyrenius Beers executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided, as such executor.

1. *The estates limited by the will. That an estate for life only was devised to Cyrenius Beers, and a vested remainder in fee was given to the children of the testatrix.*

A reference to the terms of will, establishes this point. It expressly give to CYRENIUS BEERS a life estate, and to her children the remainder. It seems to us hardly to admit of much construction.

In *Doe* v. *Considine*, 6 Wall. 458, this court say:—"Trustees take exactly the estate which the purposes of "the trust require; and the question is not whether the "testator has used words of limitation, or expressions ad-"equate to carry an estate of inheritance, but whether the "exigencies of the trust demand the fee simple, or can be "satisfied by any and what less estate." And further:—"A vested remainder is where a *present* interest passes to "a *certain and definite* person, but to be enjoyed *in futu-"ro.*" And that "it is a rule of law that estates shall be "held to vest at the earliest possible period, unless there "be a clear manifestation of the intention of the testator "to the contrary."

CYRENIUS BEERS was clothed with no trust which required him to take the fee. The only trust declared is "to receive the rents, income and profits during his life," or if he exercised the power of sale given, then he was to have the use of the proceeds during his life. His whole estate was clearly a life estate at the most, with a collat-

eral power to encumber or sell. The children of the testatrix took a vested remainder in fee at her death. *Doe* v. *Martin*, 4 Durnf. and East's Term Rep., 39, is exactly in point. In that case a conveyance was made to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of their children or such of them and for such estates as the husband and wife should appoint; and for want of appointment to all the children equally; with a power of revocation of uses in the settler, and a power of sale and re-investment to same uses in the trustees. It was held that the children took a vested remainder in fee liable to be divested by the appointment.

2. *That the extension was not authorized by the power.*

It is not at all essential to our case to sustain this point, because, as we shall show, even if the power would have authorized it, the act cannot be referred to the power, or be regarded as in execution of it. *Infra* p. 16. We however insist that the power did not authorize the act. The power was a naked power to *encumber for the purpose of raising money to pay off* existing incumbrances, and to renew any of such *new* incumbrances by him so to be made. We respectfully submit that that is a different thing from *extending* one of the existing incumbrances. Nor does the one include the other.

In *Ward* v. *Bank of Ky.*, 7 T. B. Mon. 93, it was held that the power to make notes for discount to a certain amount did not authorize the renewal of said notes.

In *Seitzinger* v. *Weaver*, 1 Rawle R. 377, 383-384, it was held that a power given by will to executors to sell and convey for the payment of debts and education of the testator's children, did not authorize them to complete a contract for the sale of land made by the testator himself.

A power to sell lands does not include or give the

lesser power to mortgage. *Albany Fire Ins. Co.* v. *Bay*, 4 Comst. 9; *Ferry* v. *Laible*, 31 N. J. Eq. 566; *Stokes* v. *Payne*, 58 Miss. 614; 4 Kent Com. *331.

Hoyt v. *Jaques*, 129 Mass. 286.

The case of *Tasker* v. *Small*, 6 Simons R. 625, (which was cited by counsel for appellee upon this point in the court below) is not in point, nor an authority for appellee, but by showing what is within the terms of a power, also negatively shows what is not within its terms. There was a power to *raise* $15,000 by mortgage, annuity *or otherwise*; and it was held that it was within the terms of the power—"or otherwise"—to *raise the money by sale.* The power there was to *raise money* in any manner the donee of the power might see fit to employ. *This he did literally*, and thus acted strictly within the express terms of the power—the act done was the precise thing authorized. In the case at bar this cannot be claimed. Here the power is to *incumber to raise money to pay off* existing incumbrances, not to extend existing incumbrances. The donee of the power certainly could not encumber, nor raise money, nor pay off the incumbrance, by extending the incumbrance.

Again, the power in this case expressly gives the donee the power to extend any *new* incumbrance he might put on the property by virtue of the power. *Supra* p. 11. If the testatrix intended the power to incumber to include the power to extend, then why expressly give this power to extend? This shows that she uses the words "to incumber" as not including the extension of an incumbrance.

This power to extend certain incumbrances, viz: new incumbrances which he might make by virtue of the power, excludes the power to extend incumbrances already existing, on the principal *expressio unius est exclusio alterius.*

Moreover, the purpose of this power to incumber — "for the purpose of raising money to pay off any and all "incumbrances now on said property"—shows that an extension, as is here claimed, was not contemplated or intended. The testatrix may have thought her husband would have been more likely to pay his debt when due, and exonerate her estate, if she withheld from him the power of extending the incumbrance. She may have thought, that if he was compelled to raise the money instead of extending his debt, he would be more diligent and likely to obtain the money in the market on better terms and at a lower rate. By raising the money in the market, the benefit of competition, and the lowest market rates are obtained; but in case the debt is extended, it is done on the creditor's terms. If an extension was asked and obtained it would not therefore be so likely to be at market rates; and would be obtained, not improbably, at even a higher rate than the present high rate of 8 per cent., as the result has shown was here the fact. The testatrix may have had reasons for desiring not to prolong the relations with the appellee company, or she may have had that desire without any substantial reasons. There may be many reasons why the testatrix gave the power as it was, and withheld the power to extend this mortgage, which show that such extension is not within the power given.

No excuse or reason can be shown for not observing the terms of the power. There is nothing to show that the money could not have been raised by incumbrance to pay appellee's claim, or that any attempt whatever was made to raise it.

THE AGREEMENT OF EXTENSION WAS NOT IN EXECUTION OF THE POWER.

This involves the consideration of our points numbered 3, 4, 5, pp. 6-8 *supra*; and we apprehend will prove to be a question involving much of the controversy of the case. The facts bearing upon the question are all found in the agreement of extension itself.

The question when an instrument, which does not profess to be in pursuance of a power, shall be construed to be in execution of the power, has frequently engaged the attention and learning of the English courts from an early day. And while there has been criticism of some decisions, in the application of the settled principles to the facts of the particular cases, we believe there has never been much controversy over those principles themselves. The question in each case is whether an intention to execute the power was clearly manifested. And it is settled by the unbroken line of decisions, from *Sir Edward Clere's case*, in 6 Coke R., and *The Commendam case* in the reports of Lord Chief Justice HOBART to this time—we believe without exception—that the intention to execute the power *must be so clear and apparent as to exclude every other hypothesis.* It must be *demonstrated* that the donee of the power had the power in contemplation and intended to execute it. Mr. Justice STORY, in *Blagge* v. *Miles*, 1 Story R. 446, gave this subject, and the authorities bearing upon it, a very exhaustive consideration. He says:

"I agree that the intention to execute the power "must be apparent and clear, so that the transaction is "not fairly susceptible of any other interpretation."

Chancellor KENT lays down the principle:

"The intent must be so clear that no other reason- "able intent can be imputed to the will." 4 Kent. Com. *335.

In *Doe v. Roake*, 2 Bing. 497, 512, BEST Ch. J. says:

"The intent to execute [the power] must be so clear "ly manifested by the will [which is claimed to be an ex- "ecution of the power], that it is impossible to impute any "other intention to a testator than that of executing it."

The criterion adopted in the English courts, to determine whether the power is executed, is concisely laid down by Lord Chief Baron ALEXANDER, in delivering the judgment of the judges in the House of Lords, in *Roake* v. *Denn*, 1 Dow & Cl. 437, 448:

"Of all the cases, commencing with *Sir Edward* "*Clere's case* in 6 Rep., and coming down to the present "time, there is not one instance in which a power of ap- "pointment has been held to be executed by a will, unless "there is a reference in the will either to the power, or "to the property which is the subject of it, or unless the "instrument be totally inoperative without supposing an "execution of the power."

We quote again from Mr. Justice STORY in the case above referred to:

"On the other hand, to use the language of Lord "Chief Justice Best in *Doe. d. Nowell* v. *Roake*, 2 Bing. "497, 504, no terms however comprehensive, although "sufficient to pass every species of property, freehold or "copyhold, real or personal, will execute a power, unless "they demonstrate that a testator had the power in his "contemplation and intended by his will to execute it.

"Three classes of cases have been held to be suffi- "cient demonstrations of an intended execution of a pow- "er. (1) Where there has been some reference in the will "or other instrument to the power; (2) or a reference to "the property, which is the subject on which it is to be ex- "ecuted; (3) or where the provision in the will or other "instrument, executed by the donee of the power, would "otherwise be ineffectual or a mere nullity; in other "words, it would have no operation except as an execu- "tion of the power. It seems unnecessary to refer at "large to the cases which establish these propositions. "Lord Chief Baron Alexander, in delivering the judgment "of the judges in the House of Lords, in *Denn. d. No-* "*well* v. *Roake*, 6 Bing. R. 475, reversing the decision in "the same case in 2 Bing. R. 497, and affirming that of "the King's Bench, 5 B. & Cressw. 720, has enumerated

"the same class of cases; and he has added that in no in-"stance has a power or authority been considered as ex-"ecuted except under such circumstances." 1 Story R. 446-7.

And the same distinguished authority, in his work on Equity Jurisprudence, says:

"It is a general rule that in the execution of a pow-"er, the donee of the power must clearly show that he "means to execute it, either by a reference to the power "or to the subject-matter of it; for if he leaves it uncer-"tain, whether the act is done in execution of the power "or not, it will not be construed to be an execution of the "power." Story Eq. Jur. § 1062, a.

Now in the case at bar, this agreement of extension makes no reference whatever either to the power, or to the property of the testatrix which is the subject of the power. It does mention the fact that the mortgage was made, and refers to the *covenants of* CYRENIUS BEERS therein, and the keeping *by him* of the covenants. But not a word is said of the property, which (and not the mortgage) is the subject of the power. Nor is anything said in the agreement of the lien of the mortgage.

It is carefully expressed to save *his* liability on his bond, and expressly provides that nothing therein contained "shall operate to release or discharge said CYRENIUS "BEERS or his heirs, executors or administrators from "their liability upon said bond," but it significantly says nothing about saving the lien of the mortgage. It provides for new interest coupons at 9 per cent. during their extension, and contains covenants on the part of Mr. BEERS for their payment, but they are not made a charge or incumbrance on the land.

Moreover, every provision of this agreement can have its full operation and effect—all that it professes to do or provide for can be done, according to its full tenor, without referring the act to the power, and by referring it solely to the individual interest of CYRENIUS BEERS as

the debtor of appellee. The agreement of extension is as follows [Printed Rec. 67-8]:

Memorandum of agreement made and entered into this twenty-fourth day of February, A. D. 1874, by and between the Connecticut Mutual Life Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, and State of Connecticut, of the one part, and Cyrenius Beers, of the city of Chicago, in the county of Cook, and State of Illinois, of the other part.

Whereas the said Cyrenius Beers is justly indebted unto the said The Connnecticut Mutual Life Insurance Company in the sum of twenty thousand ($20,000) dollars, secured to be paid by the certain bond or obligation in writing of the said Cyrenius Beers, bearing date at Chicago aforesaid, the twenty-fourth day of February, A. D. 1869, in the penal sum of forty thousand ($40,000) dollars, conditioned for the payment unto the said company, its successors or assigns, of the principal sum of twenty thousand ($20,000) dollars on the twenty-fourth day of February, A. D. 1874, with interest thereon at the rate of eight per centum per annum, payable half yearly; and whereas the said principal sum of said bond is still wholly unpaid and the said Cyrenius Beers, party of the second part hereto, hath applied to said The Connecticut Mutual Life Insurance Company to extend the time for the payment of said principal sum; and whereas the said Cyrenius Beers and Mary, his wife, executed and delivered their certain indenture of mortgage to said company, bearing even date with said bonds to secure the payment thereof, which said mortgage was duly recorded in the recorder's office of said Cook County: Now, this memorandum witnesseth, that the said The Connecticut Mutual Life Insurance Company in consideration of the covenants and agreements on the part of the said Cyrenius Beers hereinafter contained, the prompt and faithful performance whereof is a condition precedent hereto, and time being the essence of this contract, doth hereby extend and postpone the time of payment of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned until the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy nine, interest to be

paid thereon at and after the rate of nine per centum per annum, half yearly, in the same manner and at the place or places in the condition of said bond mentioned; and the said Cyrenius Beers, in consideration of such extension of the time of payment of said principal sum, doth hereby covenant, promise and agree to and with the said The Connecticut Mutual Life Insurance Company, its successors and assigns, that he will well and truly pay the said The Connecticut Mutual Life Insurance Company, its successors and assigns, said principal sum of twenty thousand ($20,000) dollars on the twenty-fourth day of February, which will be in the year of our Lord one thousand eight hundred and seventy-nine, at the place in the condition of said bond mentioned, and also interest thereon at the rate of 9 per cent. per annum, half yearly, to wit, on the twenty-fourth day of each of the months of August and February, which will be in each and every year during such extended time of payment, according to the tenor and effect of the ten (10) coupons or due bills signed by said Cyrenius Beers, bearing even date and given herewith, it being expressly understood and agreed by and between the parties hereto that in the event of a failure to pay either or any of said coupons at maturity, then, at the election of said The Connecticut Mutual Life Insurance Company, its successors or assigns, the whole of said principal sum of twenty thousand ($20,000) dollars in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all arrearages of interest thereon, in the same manner as if said extension had never been granted. It is further expressly understood by and between the parties hereto that nothing herein contained shall operate to discharge or release the said Cyrenius Beers, his heirs, executors, or administrators, from their liabilities upon said bond, but it is expressly understood that this instrument is to be taken as collateral and additional security for the payment of said bond. It is also expressly understood and agreed by and between the parties hereto that in the event of failure on the part of the said Cyrenius Beers, his heirs, legal representatives, and assigns to fulfill, keep, and promptly perform, as well in spirit as in letter, the covenants in said mortgage contained, given by Cyrenius Beers to said company, then at the election of said The Connecticut Mutual Life Insurance Company, its succes-

ors or assigns, the whole of said principal sum in the condition of said bond mentioned shall thereupon at once become due and payable, and may be collected without notice, together with all accrued interest thereon at said rate of nine per centum per annum, anything herein before contained to the contrary notwithstanding.

In witness whereof the said parties to these presents have hereto set their hands and seals the day and year first-above written.

CYRENIUS BEERS.

Now if the power did not exist, all this might have been done. CYRENIUS BEERS procured the extension of his indebtedness;—that surely could have been done—was *ex necessitate* done—from his own interest. He covenanted and agreed to pay interest at 9 per cent. instead of 8 for the extension, and he covenanted to pay the debt at the expiration of the extended period. His personal covenants make up the agreement, but he needed no power to make them. We respectfully ask counsel for appellee to point out one single element of the act of extension, or a provision of this agreement, which is not fully operative without regarding it as done in pursuance of the power, or which could not have been done except on the basis that he was acting under the power. That is the test.

The rule for determining whether an act or instrument is to be held to be in execution of a power is also stated in this way:

IF AN ACT WILL WORK EITHER OF TWO WAYS, THE ONE BY AN INTEREST AND THE OTHER BY A POWER, AND THE ACT BE INDIFFERENT, THE LAW WILL ATTRIBUTE IT TO THE INTEREST AND NOT TO THE POWER.

This principle applies to all classes of authorities and powers, and to all kinds of acts and instruments claimed to be in execution of powers. In *Sir Edward Clere's case*, 6 Coke, 17 b, it was applied to a will claim-

ed to be an execution of a power of appointment. In the great *Commendam case*, in the time of Lord Chief Justice HOBART, (Hob. 159–160) it was applied to the construction of the Patent of the King, called his Dispensation, to solve the question whether he acted from his interest or prerogative, or under authority of an act of Parliament.

Chancellor KENT states the rule in the following clear language:

"The general rule of construction, both as to deeds "and wills, is, that if there be an interest and a power existing together in the same person over the same subject, "and an act be done without a particular reference to the "power, it will be applied to the interest and not to the "power. If there be any legal interest on which the deed "can attach, it will not execute a power. If an act will "work two ways, the one by an interest and the other by "a power, and the act be indifferent, the law will attribute "it to the interest and not to the authority, for *fictio cedit "veritati*" 4 Kent Com. *334-*335.

Now this agreement of extension comes directly within this rule. There was the interest as debtor, and the power from the surety, existing together in Mr. BEERS, concerning the providing for this indebtedness of himself. He makes this agreement of extension of his debt, professedly acting entirely from his interest. The extension *operates upon* his interest–his debt; and every provision of the agreement has the full operation it purports to have by regarding it solely as his personal act, and by referring it to his interest and not to the power. Is it not clear and undeniable, under the rule stated, that the act and agreement must be referred solely to his interest, and be regarded as not in any way referable to the power? The language of the court in *Maundrell* v. *Maundrell*, 10 Ves. *258, covers this case precisely:

"When a party has both an authority and an interest, and does an act purporting to mean to pass the interest, he shall be held to intend that and not to exercise his authority."

Nor could the attitude be changed by claiming that the extension was made with the consent of Mrs. BEERS, given in her lifetime. That would be begging the question, after misstating it. She gave no such consent. There is not a word in the will which shows that she contemplated the contingency of his extending this indebtedness; on the contrary, she makes provision by which *it may be paid off*. A *consent* of a surety to the extension of the principal's indebtedness cannot be given unintentionally. She gave her husband a *power* to do certain things, but there is no evidence whatever that he has ever exercised the power, as we have already argued.

Now it would not matter that all that was necessary for Mr. BEERS to do under the power, to render the act of extension binding on Mrs. BEERS' estate, (assuming such to be the case), was to *consent* to the extension, because that would have been all that she would have had to do if alive. It would be, nevertheless, necessary that it should *appear affirmatively and conclusively* that he acted under the power—that he intended to execute it. It makes no difference what the nature of the act authorized is.

Now there is absolutely nothing to show that Mr. BEERS had the will in contemplation at all, or intended to act in pursuance of its powers, either in consenting to the extension, or procuring or making it. He might have done everything he did if he had had no power. Everything is referable to his own interest.

Nor is there anything to show that the CONNECTICUT MUTUAL LIFE INS. CO. had the will of Mrs. BEERS, or the continued liability of her estate, in contemplation in granting the extension. The Insurance Co. knew that the title to the mortgaged property was in Mrs. BEERS, and that she was therefore a mere surety, because the mortgage itself recited that

fact. [Printed Rec. 62.] There is nothing to show that Mr. BEERS exhibited the will to the Insurance Co., or that they ever saw, or knew of its existence. They did not grant the extension in consideration of its provisions or powers. The agreement states that the INSURANCE CO. granted the extension "in consideration of the covenants "and agreements on the part of said CYRENIUS BEERS, "hereinafter contained;" and the whole agreement shows that nothing but the liability of the debtor was in contemplation or provided for. If this was done in pursuance of the power in MRS. BEERS' will, or of any consent on her part, pray, where is the evidence or indication of it? There is plenty of evidence on the face of the agreement that the act was entirely the individual act of CYRENIUS BEERS, but there is not a word to indicate that he was acting in pursuance of the power. And as the act was fully operative without its being regarded as done under the power, it will be referred to his interest, and not to the power under the principles and authorities we have cited.

"Slight circumstances of conformity or reference "will not amount to a sufficient indication of the intention. "Thus where a power is given to the husband after the "death of his wife, and he makes a general disposition "to take effect after his wife's death, that will not of it-"self be deemed evidence of his intention to execute the "power. *Andrews* v. *Emmott*, 2 Bro. P. C. 297. So when "the subject of the power is three per cent. consols, and "the testator, having this power, gave some three per cent. "consols as pecuniary legacies, this will not be regarded "as sufficient evidence of an intention to execute the "power. *Nannock* v. *Horton*, 7 Ves. 398." 1 Sugd. Pow. *370–1.

A construction to be favored by the Court both of the power and of the agreement of extension, which will favor the surety.

We do not need to invoke the application of any spe-

cial or peculiar favor to entitle us to this case. The well settled principles of construction applicable to powers, and to acts and instruments claimed to be in execution of powers, which we have heretofore referred to, excludes the claim of appellee that the will of Mrs. BEERS can in any way be appealed to to prevent the operation of the extension as a release of her property from the mortgage. But counsel for appellee will see in the position of the CONNECTICUT MUTUAL LIFE INS. CO., as a creditor who has advanced its money, some peculiar claim to a construction and to an application of rules of law, which shall incline to save it its security. But we owe it no money. It has no claim whatever upon us. Nor was the extension any favor to us. It was not done by this INSURANCE CO. to save us our property and avoid the necessity of foreclosing a lien upon it. Not at all. There was ample provision made by which a foreclosure of this mortgage could have been then prevented. The money could have been raised without difficulty. It is regarded as no favor to a surety to extend the debt of the principal without the surety's knowledge or consent. It is conclusively presumed to be to the surety's injury, and hence the rule of law which discharges the surety in such a case. It was the semi-annual interest at *nine* per cent. per annum, which moved the CONNECTICUT MUTUAL INS. CO. to extend the debt, rather than have its money. The position of this INSURANCE CO. is that of one seeking to charge the payment of another's debt upon the property of a surety, upon whom it has no claim whatever, either to money or gratitude. It is the *surety* in such a case, and not the creditor, who has favor in a court of equity.

In *Law* v. *East India Co.*, 4 Ves. 833, it is said, in the opinion of the court:—

"Where any act has been done that may injure the

"surety, the court is very glad to lay hold of it in favor "of the surety."

And so the New York Court of Appeals, in *Kingsbury* v. *Westfall*, 61 N. Y. 360, states the rule in these terms:—

"It is too well settled to admit of a doubt, that a guar- "antor, like a surety, is bound only by 'the strict letter or "'precise terms' of the contract of his principal, whose "performance of it he has guaranteed, that he is in this "respect 'a favorite of the law', and that a claim against "him is *strictissimi juris*. (*Wright* v. *Johnson*, 8 Wend. "512–516.)"

And Mr. Justice NELSON, in delivering the opinion of the court in *Wright* v. *Johnson*, 8 Wend. 516, says:

"It has often been decided that *sureties* are bound "only according to the strict letter or precise terms of "their contract, and are considered as favorites of the law."

So in *Chase* v. *McDonald*, 7 Harr. & J. 193, the court says:

"As against a surety, the contract cannot be carried "beyond the strict letter of it. It cannot be extended by "equitable construction. *Straton* v. *Rastall*, 2 T. R. "370. In support of the same doctrine, that a surety is "not liable beyond the letter of his engagement, see "*Wright* v. *Russell*, 3 Wils. Rep. 539. A surety who "becomes bound for the good conduct of a clerk to A, "is not bound to him and a partner subsequently taken "into partnership. In this last case the court say, "courts of equity are favorable to sureties, for where "they are not strictly bound at law, a court of equity "will not bind them." *Chase* v. *McDonald*, 7 Harr. & J. 193.

The power in this case, under which appellee claims the lien of its mortgage was saved and extended, is the act of a surety. In construing the power and any act claimed to be done in pursuance of it, the rules are to be applied which apply to the contract and liability of sureties. They are to be construed liberally in favor of the surety, and strictly when made the basis of a claim against the surety.

5. *The power in said will to* CYRENIUS BEERS *to incumber or sell is a naked, discretionary power, and is not a trust, or coupled with a trust, or a mixture of trust and power, of which appellee (his creditor) can compel the execution for its benefit.*

The learned counsel for appellee, to avoid the insurmountable difficulties of his case, if it is left to depend upon the power in the will, as a naked power, has with ingenuity (if with abstruseness) claimed that the will raises a trust in appellee's favor. We apprehend it will be less difficult to disprove this position than to establish it. The language of the will itself seems pretty effectually to dispose of this claim:

> I give and bequeath to my husband, Cyrenius Beers, all the estate both real, personal and mixed of which I die seized or possessed, to be held by him in trust for the following uses, purposes and trusts, *and none other*, that is to say: to receive the rents, issues and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers and Charles G. Beers, share and share alike, to them, their heirs and assigns forever. [Printed Rec. p. 11.]

There is here no trust for the benefit of the CONNECTICUT MUTUAL LIFE INSURANCE CO. The testatrix expressly provides that the devise was upon no other trust than the one specified, which is for the benefit of her estate and children. The whole purport of the will shows that the intention of the testatrix was to benefit her estate and family—to save her estate for her children—the natural objects of her bounty. What claim this insurance company had upon her bounty, it is not easy to see.

So natural and so to be expected is it for parents to provide in their wills for their children before all others, that in cases of doubtful construction the leaning of the courts to that view has often solved the case in their favor. It is *this presumption* in favor of children or relations which has given rise to the multitude of cases in which courts

have construed precatory words in a power or devise to be a trust, and upon which the jurisprudence of "powers "in trust" and "powers coupled with a trust" is largely based. We do not propose to enter the limitless field of this jurisprudence. It is enough to say that it is in favor of children, and not against them, nor in favor of insurance companies, that courts of equity have gone to such lengths to raise a trust out of a power that Lord ELDON was led to say that "this sort of trust is generally a sur- "prise upon the intention" (1 Vesey & Beames 315), and Lord Chief Baron RICHARDS that "courts seem to me "rather to have made than to have given effect to the "wills of testators." (1 Simons 552.)

"The question whether a power is simply such, or "one in the nature of a trust, has hitherto arisen almost "invariably on powers in favor of children or relations; "and it might be a question admitting of very grave ar- "gument whether the construction that has been adopted "in those cases would be extended to strangers." Hill on Trustees *67, citing *Jones* v. *Clough*, 2 Ves. 367; *Ball* v. *Vardy*, 1 Ves. Jr., 270; 2 Sugd. Pow. 175, 6th Ed.

So Sir EDWARD SUGDEN says:

"The question whether a power is simply such, or a "power in the nature of a trust, commonly arises on a "power to appoint to a man's children or relations." 2 Sugd. Pow. 159.

Moreover, the result of the modern English and American cases, has modified the old rule, and followed the principle of seeking the true intention and making that intention the rule of decision. Hill on Trustees *72 note; *Ellis* v. *Ellis*, 15 Ala. 301; *Skrine* v. *Walker*, 3 Rich. Eq. 262; *Pennock's Estate*, 20 Penn St. 268; *Gilbert* v. *Chapin*, 19 Conn. 342.

A power is not to be regarded as a trust, because it is given to a trustee. Because Mrs. BEERS uses the words "in trust" in her devise to her husband, and then gives him a power, the power is not therefore a trust, or

anything but a naked, discretionary power. But that is all there is on which to base a claim of trust. Mr. LEWIN, in his work on Trustees, page *22, draws this distinction very clearly:

"A *mixture of trust and power* is not to be confounded with a *common trust to which a power is annexed*; for "in the former case, as in a trust to distribute at the discretion of the trustees,' they are bound at all events to "distribute, and the manner only is left open; but in the "latter case, the trust itself is complete, and the power "being but an accessory, may be exercised or not, as the "trustee may deem it expedient; as where lands are limited to trustees with a power of varying the securities, "for in such a case the power forms no integral part of "the trust, but is merely collateral and subsidiary, and "the execution of it, in the absence of fraud, cannot be "compelled by application to the court."

A distinction has also always been observed between cases where the donee of the power has also the estate out of which the power is to be exercised; and cases like this at bar, where the donee of the power is the tenant for life, and the exercise of the power takes from the remainderman. In the former case, the court will construe it a trust, where in the latter case they would hold it to be a naked power. Hill on Trustees *67–*68.

Nor can appellee ask the aid of equity to aid this as a defective execution of the power in Mrs. BEERS' will, because:

(1.) This is a case of a *non*-execution of a power, and not of a defective execution; and in the case of a non-execution of a power a court of equity assumes no jurisdiction to grant relief. 2 Sugd. Pow. *157; *Arundell* v. *Phillpot*, 2 Vern. 69; *Tollet* v. *Tollet*, 2 P. Wms. 489.

(2.) The Connecticut Mutual Life Insurance Company, as the creditor of CYRENIUS BEERS, claiming under the execution of a power in the will of Mrs. BEERS, has no equity as against her devises and heirs at law. As

against Mrs. BEERS and appellants, her devisees, appellee is a volunteer, and a defective execution of a power is not aided in favor of such a party. 2 Sugd. Powers *93; *Speck* v. *Wohlein*, 22 Mo. 310.

7. *The estate given to the children of Mrs.* BEERS *was not diminished by the unexecuted powers or provisions in her will.*

The learned counsel for appellees has urged the position somewhat strenuously that Mrs. BEERS by her will *charged* this debt of CYRENIUS BEERS upon her estate, and thus in some way made it her own debt; and also that this power was in effect a setting aside or giving a fund sufficient to pay that debt; and that her children were only given the *residue* after this debt had been paid, or a fund had been first raised out of the estate to pay it. We confess to some difficulty in comprehending this position. We do not know what there is on which to base it. It is very improbable that Mrs. BEERS intended to make the CONNECTICUT MUTUAL LIFE INS. CO. a beneficiary under her will. Such a claim is so improbable as to appear almost absurd. But that is what this means, if we understand it. It is very improbable that Mrs. BEERS intended to yield or give up any of the benefits of her position as surety. If, as is said, the intention of the testator is the *pole-star* in the construction of wills, the intention of Mrs. BEERS is so plain that this question cannot admit of any doubt. It is certain it was not to benefit this insurance company. It was not to load her estate with any further charges for the benefit or security of this company; but it was to benefit her estate—to save and protect it for the benefit of her children. We apprehend it would require a very clear indication of an intention of the testatrix to benefit a foreign life insurance company in preference to her children, before a court would feel justified in giving such a construction to her will.

She had mortgaged her estate to this company to secure her husband's debt, and thus made her property surety for its payment. She doubtless thought, if he failed to pay it when due, her estate might be called upon to pay it, and she therefore made provision by which if it became necessary for her estate to pay it when it became due, the money for that purpose could be raised to the best advantage for the estate. Is there any evidence in this of an intention to make this debt her own, or to give up her position as surety? Not the least. The plain purpose is, not to charge her estate, but to save it from the incumbrances upon it.

Nor can it be maintained that this so-called charging her estate with this debt, or carving out of her children's portion a fund for its payment, was a gift to the husband of the testatrix of such a fund. The trouble is with such a claim that there is nothing in the will whatever on which to base it. The plain language of the will forbids any such forced construction. If she intended to devise or bequeath to him any such fund, or anything else, besides the life estate, she would have so done in the plain language in which she gave him the life estate. There is not the slightest indication in the will that she intended by its terms and provisions to change her attitude to the Insurance Co., or to Mr. BEERS' indebtedness, in the least. Besides the life estate devised to him, she gave him a naked power to encumber or sell. The power itself did not enlarge his estate, or diminish that of the children.

We have, *supra* pp.12-13, discussed the position that by this will, CYRENIUS BEERS took an estate for life with a naked power to encumber or sell; and the children of Mrs. BEERS took a vested remainder in fee upon her death, which, upon the decease of the tenant for life, CYRENIUS BEERS, became an estate in fee simple. Such we submit is the clear construction of the will. *Hoyt* v. *Jacques*,

129 Mass. 286; *Doe* v. *Considine*, 6 Wall. 475; *Doe* v. *Martin*, 4 Term R. 39; *Lambert* v. *Thwaites*, 2 L. R., Eq. Cas., 155.

In the construction of wills, courts have manifested a solicitude to protect the interests of heirs, and every fair intendment is made in their favor. The court will not construe the will to give the property a different direction from that prescribed by the rules of descent, unless such an intention is clearly expressed in the will. *Moore* v. *Heaseman*, Willes 141; *Roe* v. *Blockett*, Cowp. 235; *Areson* v. *Areson*, 3 Denio 458; *Bender* v. *Dietrick*, 7 Watts and Serg. 284; *Luce* v. *Harris*, 79 Penn. St. 432; 1 Redf. on Wills, 434, 435; 2 Jarman on Wills, 741 Rule V.

Respectfully submitted,

JOHN S. MILLER,

For Appellants.

109-357

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Supreme Court of United States.

OCTOBER TERM, A.D. 1883.

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No. 125.
Appeal from the Circuit Court for the Northern District of Illinois.

ARGUMENT FOR APPELLEE.

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ARGUMENT.

Cyrenius Beers, and Mary, his wife, executed a mortgage of land to the Connecticut Mutual Life Insurance Company.* The debt secured was, we assume, originally the debt of the husband, and the land was the property of the wife. Both are now deceased; Mrs. Beers died on October 8, 1869, and this mortgage was, we understand, the *only incumbrance* on her estate. The appellants are two of the children of the mortgagors. Their brother, Charles G. Beers, who joined in their answer, but not in their cross-bill in the court below, refused to join in their appeal. Their claim is that the lien of the mortgage was discharged and the security lost, because on the maturity of the bond the mortgagee extended to their father, Cyrenius, time for its payment.

The state of facts presented, under which the appellee gave this indulgence, was as follows. Mrs. Beers died leaving a will which was duly proven, and of which the following is a copy:

I, Mary Beers, wife of Cyrenius Beers, of Chicago, of lawful age and sound mind, in view of the uncertainty of human life, do make, publish and declare this my last will and testament:

---

* Mortgage of CYRENIUS and MARY BEERS to the Connecticut Mutual Life Insurance Company, dated February 24, 1869, recorded February 27, 1869; given to secure bond of CYRENIUS BEERS of same date for $20,000, payable February 24, 1874; conveying part of Lots 4 and 5, in Block 8, in Fort Dearborn addition to Chicago.

FIRST, I order all of my debts to be paid, including the expenses of my funeral and last illness.

SECOND, *I give and bequeath to my husband*, Cyrenius Beers, *all the estate, both real, personal and mixed of which I die seized or possessed*, to be held by him *in trust for the following* uses, purposes and trusts and none other, that is to say: to receive the rents, income and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster, Rissa J. Beers and Charles G. Beers, share and share alike to them, their heirs and assigns for ever.

But provided, that said Cyrenius Beers *may encumber the same* by way of mortgage or trust deed or OTHERWISE, and renew the same for the purpose of raising money to pay off *any and all incumbrances now on said property* and which trust deed or mortgage so made *shall be as valid as though he held an absolute estate in said property.*

But provided further, that the said Cyrenius Beers *may in his discretion, during his life sell and dispose of* any or all the real estate of which I may die seized or possessed *as though he held an absolute estate* in the same, and *out of the proceeds pay any of the incumbrances* upon any of the property of which I may die seized and possessed, and the *remainder over and above what may be required to pay the indebtedness* upon said property, the same now being encumbered, to reinvest in such way as he may see proper, and from time to time to sell and reinvest, such reinvestment to continue to be held in trust, the same as the estate of which I may die possessed, that is to say, the said Cyrenius Beers, only to have the use during his life of said estate, with the right of sale and to encumber and reinvest, the remainder after his death to go to my children above-named and their heirs for ever.

THIRD, I hereby appoint said Cyrenius Beers executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided as such executor.

In witness whereof, I have hereunto set my hand and seal this fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-nine.

MARY BEERS.
[SEAL.]

The debt fell due in February, 1874. Its maturity arrived in the midst of the panic which attended the financial

wreck that began in the fall of 1873. It was impossible for Cyrenius Beers to pay this debt of $20,000. Nothing could be sold without ruinous sacrifice. It was impossible for him at that time to procure anywhere on the face of the earth a new advance of $20,000 upon a new mortgage of these premises. The security was insufficient. The time had come when it was necessary for him to do some of those things for which the will of his wife, Mary Beers, had provided, or lose altogether the estate given to him and his children. He applied accordingly to the actual mortgagee, and asked it to forego enforcement of the debt, and to re-establish the existing mortgage for another term. He produced the will of Mary Beers, and exhibited the estate given to him by that will, and the ample powers and full discretion given to him in connection *with that estate and as part of it*, and the manifest intent of testatrix, that these powers should be exercised *as occasion should require* in his discretion, to provide for the existing incumbrance on her land, and to protect the land by the most judicious methods available from unnecessary sacrifice. For these purposes the will expressly gave him the power and right "to encumber by way of mortgage or trust deed, *or* OTHER-"WISE," and "in his *discretion* during his life, to sell and "*dispose of* all real estate *as though he held an absolute es-*"*tate in the same.*" All these powers are *a part of the estate given to him*, as is shown by the clause near the end of the will in which the testatrix epitomizes the donation to him as follows: "*that is to say*, the said Cyrenius Beers *to* "*have the use during his life* of said estate, *with* the right "of *sale and to encumber and reinvest.*" We assume, as insisted by the defendants, that the will gave a life estate to him. It gave him far more, as we shall presently see; but at present we are looking merely at the powers of man-

agement which were given him together with his interest. These powers were important to enable him to protect even the life estate given to him; and the gifts in remainder, if they may be properly so called, were subject and subordinate to this life estate, and to this right by sale, incumbrance or *otherwise*, to provide as he best could for the existing incumbrance on the estate.

Simpson v. *O'Sullivan*, 7 Clark & Fin., 550.

Accordingly, the new arrangement between Cyrenius Beers and the mortgagee, whatever that arrangement may have been, was made in reliance upon the estate and powers conferred upon Cyrenius by this will. We assume, for the purpose of this argument, that the agreement was what it is alleged to have been, and that it reëstablished the existing mortgage for a new term of five years.

Now for a defense, the rule is invoked by these daughters that time given by a creditor to a debtor, *without the assent of the surety*, discharges the surety. These daughters of Mrs. Beers say they have estates in remainder in this land, after the life estate merely of Cyrenius, their father; that they stood in the place of the mortgagor entitled to her equities, and to "every defense *which would have availed* "*to her* had she lived;" that the mortgage lien could not have been extended in her lifetime without *her consent*, and could not be after her decease without theirs; that it was extended without *their* consent; and that such extension, being thus "*without the assent of the surety*, discharged the "mortgage and all claim whatever upon the estate."

It is not pretended by the defendants that the arrangement was not an act of indulgence and favor at a critical time; nor that it was not productive of convenience and of advantage. Foreclosure would have taken away the prop-

erty, and would have left them penniless. They have retained the property, enjoyed the rental, and the property has been steadily improving in value. Nevertheless, counsel declare in their brief below that a "case could hardly be "conceived" where the enforcement of the rule they invoke, and the forfeiture by the company of its security "*would be more equitable.*" The same obliquity of moral vision once seemed to pervade the whole party. Not only these daughters are persuaded that an honest debt *ought not* to be paid, but in the court below even the son-in-law and the bumptious little tenant were convinced that *equity* would never be satisfied till the mortgagee was mulcted of its debt; and they came bundling in with their separate plea that the extension extinguished the mortgage.

Regarded merely as a surety, consent was given to the extension by the will of Mrs. Beers. No other consent was of any importance.

We shall engage in no discussion of the rule that time given to a principal debtor, without the assent of the surety, will discharge the surety; nor deny that the rule may be applied to land charged with a mortgage, as well as to the personal liability of a surety. It is sufficient in the present case that *no extension was given without consent* of the surety. The interests given these appellants by Mary Beers' will were, of course, subordinate to the *precedent* estate given by that will to her husband, and to the powers coupled with that estate and conferred upon him. If under that will he had authority to do what he did, the assent of these appellants was wholly unimportant. The will in such case *contained the assent of the only person whose assent as a surety was of any significance.*

The authority in question lies so patent on the face of the will that it is too conspicuous to be debated. A general power given to a life tenant to encumber an estate by mortgage, trust deed, *or* OTHERWISE; and in his *discretion*, during his life, to DISPOSE of it "*as though he held an absolute estate in the same*," includes the power and authority to reëstablish and continue in force an existing mortgage. Suppose a power by will to trustees to lease. Will it not authorize them to continue an expiring lease, made by the testator, for a new term? Is the *form* of the contract material when the power contains no specifications on that subject? Cyrenius was authorized to make a contract by which the estate should be encumbered to provide for its liability on an existing mortgage. He executed this authority, and nothing more.

In *Tasker v. Small*, 6 Sim., 625, one having under a settlement a power to raise £15,000 "by mortgage, annuity, *or* "*otherwise*," it was held he might *sell* the estate for that purpose. The language of the Vice-Chancellor in this case is not only approved in Sugden on Powers, but is imported into the text, as follows:

"The Vice-Chancellor observed that the words 'by mort-
"'gage' didn't imply a sale; the word 'annuity' almost
"implied a sale, as the raising of the money by annuity is a
"more burdensome mode of raising it than a mortgage was;
"then came the words '*or otherwise*,' which *did* imply a
"sale. The words here used showed an *intention to increase*
"the power to raise the money *as occasion should require*."
1 Sugden on Powers, *514.

The Vice-Chancellor proceeded, 6 Sim., 633:

"I have no doubt upon the construction to be put on
"these words, and that they are sufficiently ample to enable
"Mr. Small to make a good title to the purchaser. The de-
"murrer, therefore, must be overruled."

Where the power over the estate, given for the purpose of raising therewith money to protect from an existing incumbrance, is in the phrase, "may encumber the same by way "of mortgage, trust deed, or *otherwise*," it is hard to find any limitation whatever of the mode or method by which the estate may be charged for the purpose prescribed.

There is in every testament what is called its "*general* "intent." It is the intent which embodies the *leading purpose* of the testator. It is *this* intent which it is the primary object of construction to find out; and when legally found it is of controlling power, and is to have effect given to it in all events. This *general intent*, says Buller, is "the first and great rule" in the exposition of wills, and it is "a rule to which all others must bend." Doug., 327. Here the manifest purpose was to clothe the husband with ample power to provide for the liability of testatrix's property under the existing incumbrance, so as to protect the estate from sacrifice, "*as occasion might require.*" It is incontestible that he had power to go through the form of making a *new* mortgage exactly like the existing one, or at any other lawful rate of interest that would have been necessary, perhaps, in dealing with a new mortgagee. But such new mortgage was unnecessary, when arranging with the holder of the actual mortgage, and what value could there be in such an idle form, when the *leading purpose* could be equally well and less expensively accomplished by the mode adopted? A new loan of this amount from new parties could not, in the midst of the panic, have been made upon this property at all. The property would have been lost in foreclosure unless the existing mortgage could have been extended. The pretense in the face of the authority of this will, that the arrangement wanted the consent of the testatrix, is too frivolous for patient argument. In view of the

leading intent and purpose shown in this will, such a constructive *limitation* of the power would *defeat* the intent, not promote it.

The husband had authority in terms to "encumber the estate by mortgage, trust-deed or *otherwise*." We think he did it strictly by mortgage within the terms of the will as to that; but if he did not, he did it "*otherwise*," and equally within the scope of the authority given.

When by deed or will powers are given in trust to enable provision to be made for the payment of debts, the powers, unless *expressly limited* to specified *modes*, will be such as are in harmony with the scope of the trust, the situation of the parties and the end to be accomplished. These are the *criteria* by which to determine what must have been intended. It will be very difficult to impose limitations of *modes* when the powers, in terms, are to proceed by mortgage *or otherwise*, and to sell and *dispose* of property, in the *discretion* of the donee of the power.

In *Tasker v. Small*, *supra*, where the settlement gave power to raise £15,000 by mortgage, annuity *or otherwise*, and it was held that the words authorized a sale, the Vice-Chancellor, Sir Lancelot Shadwell, said:

"It was said that the general power expressed in the first part of the deed is to be limited to a mortgage, because there are the words: 'Subject to any deed or deeds and assurances which he might thereafter make and execute for *securing the repayment of such sum* or sums of money, and the interest thereof. But, inasmuch as it was expressly declared before, that the settlement should be subject to his raising the £15,000 by mortgage, annuity, or OTHERWISE, *it would be too much to say that the power is to be cut down*, because there is a *foolish reference to the deeds by which* the raising of the £15,000 is to be effected."

The right to encumber, of course, carries with it the charge for a lawful rate of interest. (1 Sugden on Powers,

*516.) The power to encumber by mortgage, trust deed or *otherwise*, and in his *discretion* to sell and *dispose* of the property, gave Cyrenius *general powers of management* to be exercised as in his discretion "occasion might require" for the interest of the estate. Defendants claim to be entitled to any defense that would have availed to Mrs. Beers had she lived. Suppose she had gone abroad for ten years, and had committed the estate in the meantime to her husband with these general powers of management, *can anybody imagine such a defense as this would have availed to her?*

Assuming then that at the time of the extension, the relation was one of suretyship merely, it is nevertheless true that the extension was allowed with the full consent of the surety.

Regarding the case as one merely of the execution of a power, there was no defect in the execution.

Even if the reëstablishment of the existing mortgage, instead of the idle ceremony not required by any terms, of executing a new one to attain the same result, had involved, as it did not, a defect of form in the execution of a power, can any one doubt that equity would aid and supplement such an execution in favor of purchasers? "Mortgagees "and lessees are purchasers *pro tanto*." (1 Lead. Cas. in Eq., Pt. 1, pp. *229, *230, *234, *241. Notes to Tollet *v* Tollet.)

But there was no defect even of form, and no further reference to the power was necessary, than the reference in the agreement of extension to the existing mortgage, which was the subject matter of the power, and the plain intent arising nature of the transaction and the situation of the

parties. (Blagge *v.* Miles, 1 Story's R., 426, 445 to 450.) The rule is entirely clear, that where there is an interest and a power coupled with it, a disposition that would be either wholly or partially inoperative, unless done in execution of the power, will be referred to the power in order to uphold the actual intent of the transaction. By *Sir Edward Clere's Case*, 6 Coke, 17 *b*, it was held that where the act would be otherwise, wholly inoperative, it would be referred to the power, though there were no specific reference to it. "But," says Sir Edward Sugden, "this point has since been "carried much farther, as that, where it would have some "effect, but not all intended by the parties, there, to the end "that the main design of the parties may be observed, the "estate shall pass in another way than the parties intended. "For example: Suppose a woman seized of an estate for "life, with a power to make a lease for three lives of twenty-"one years; she marries; and then she and her husband "join in making the lease, and the husband and wife both "die before the lease is expired; here, though the husband "in right of his wife, and she in her own are possessed of "an estate for life, and therefore can, as owners, make a lease, "and there appears no intention of the parties (imagining, "perhaps, that they should have outlived the lease) that "this lease should be made by virtue of the power, yet be-"cause the lease, supposing it made by them as owners, can-"not have *all the effect* the parties intended; for some it "would have, viz., it would be a good lease during the lives "of the husband and wife; *yet because it cannot have all, it* "*shall be esteemed made by virtue of the power.*" (Sugden on Powers, *414.)

In *Maundrell* v. *Maundrell*, 10 Ves. Jr., *258, Lord Eldon said:

"The next question is, whether in this case the power has been executed. The authority of *Sir Ed. Clere's case*, as well as all general doctrine, seems to furnish this: that it is not necessary to recite that he means to execute the power, if the act is one that he can do only by that authority."

Sir Edward Sudgen further says, upon this same subject:

"So, where a married woman has a power, and an estate in default of appointment, and disposes of the estate, *e.g.*, by devise, without reference to the power, the disposition will operate as an execution of the power, because otherwise it would fail altogether.

"On the above principle it is, that where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time, *if it be fed out of his interest*, it shall *take effect by force of the power*. As, where a tenant for life, with power of leasing, grants a lease for a *term absolute*, without referring to or mentioning his power, the lease, if it be supplied out of his interest, *would expire with his life, and it shall therefore operate as an execution of the power*. So, where a tenant for life, with a power to borrow a sum of money, granted a rent charge generally, as a fund for payment of the debt, it was deemed an execution of the power, and not a grant out of his interest; because, otherwise, the payment might not be effected during the life of the grantor." (p. *418.)

In the present case the mortgage was in fee. As continued in force for an absolute term of five years more, it remained a mortgage in fee. As Cyrenius had but a life estate under the will, and a life estate cannot feed a conveyance or mortgage in fee, and *may* not an interest for *any* absolute term, the act must of course be referred to the power; and the power was well executed. Moreover, in this case the agreement of extension expressly refers to the mortgage which is the subject matter of the power. (*Blagge* v. *Miles*, 1 Story's R., 426.)

II.

Under the will of Mary Beers her estate became no longer a surety merely, but the principal debtor.

Up to this point we have discussed this case upon the *basis assumed by the appellants*, that at the time of the agreement of extension the estate of Mrs. Beers was *merely surety* for her husband's debt; and looking simply to the *authority* and *powers of management* given by the will to him, we have shown that he acted under the authority and *with the consent* of such surety. The real case before the court is, nevertheless, something far different from this. By her will Mrs. Beers *assumed the payment of this debt* for her husband's benefit, and charged its payment upon her estate, and *upon the whole* estate, real and personal. The life estate given to him, and the remainders, which, for the sake of the argument, we assume to have been limited over, were subject and subordinate to a charge for the *payment* of this debt, which the testatrix *assumed* and undertook to *pay off* as a part of the benefit given to her husband by this will.

The first disposition out of her estate, after the payment of debts, is a gift to her husband by the assumption and payment of this debt for him and by directing the application therefor, not of the mortgaged land only, but of the whole estate, real and personal. The court will observe that the appellants do not produce the will nor a clause of it. We produce it, and rest upon it; and it requires no scrutiny to see the cardinal dispositions that lie upon the very face of it.

At the time when the will of Mrs. Beers was made, and when it took effect by her death, the debt secured by this

mortgage was *her* debt, so far as the liability of that part of her estate was concerned, and was the only incumbrance on her estate. It is true that *as between her and her husband* it was his debt; and that if she paid it she would be *entitled* to become his creditor, and to hold the debt, if she chose to do so, against her husband. But as between them both with her heirs or legatees on the one hand and the creditor on the other, it was to the extent of the value of the mortgaged land *her* debt as well as his. She was liable to that extent directly to the creditor. As to the creditor their positions were identical. Her right to charge her husband for her indemnity, as between themselves, was the only difference in their situations relative to this debt.

Now look again at the provisions of this will *in this regard*. They are these:

First. I order all of my debts to be paid, including the expenses of my funeral and last illness.

Second. I give and bequeath to my husband, Cyrenius Beers, ALL THE ESTATE, BOTH REAL, PERSONAL AND MIXED, of which I die seized or possessed, to be HELD BY HIM IN TRUST for the following uses, purposes and trusts and none other, that is to say: to receive the rents, income and profits thereof during his life, with the remainder to my children, Mary C. Foster, wife of Orrington C. Foster; Rissa J. Beers and Charles G. Beers, share and share alike to them, their heirs and assigns forever.

BUT PROVIDED, that said Cyrenius Beers MAY ENCUMBER THE SAME by way of mortgage or trust deed or otherwise, and renew the same for the purpose of raising money to PAY OFF ANY AND ALL INCUMBRANCES NOW ON SAID PROPERTY, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property.

BUT PROVIDED FURTHER, that the said Cyrenius Beers may, IN HIS DISCRETION, during his life SELL and DISPOSE of any or all the real estate of which I may die seized or possessed as though he held an absolute estate in the same, and OUT OF THE PROCEEDS PAY ANY OF THE INCUMBRANCES upon any of the property of which I may die seized and possessed, and THE REMAINDER OVER AND ABOVE WHAT MAY BE REQUIRED TO PAY

the indebtedness upon said property, *the same now being encumbered*, to reinvest in such way as he may see proper, and from time to time to sell and reinvest, such reinvestment to continue to be held *in trust, the same as the estate* of which I may die possessed, that is to say, the said Cyrenius Beers only to have *the use during his life of said estate*, with the right of sale and to encumber and reinvest, THE REMAINDER after his death to go to my children above named and their heirs forever.

Third. I hereby appoint said Cyrenius Beers executor of this my last will and testament, hereby waiving from him all bail and security, as I have a right to do under the statute in such cases made and provided as such executor.

Here is then in effect:

First. A gift to the husband of a sufficient fund to pay this debt of his, and a direct charge of it upon the whole estate, real and personal.

Second. As to "*the remainder over and above what may* "*be required to pay the indebtedness* upon said property, "the same now being encumbered," a gift to him of "the "use during his life," with remainder in fee to the children.

For by the will there is *in form:*

First. A general direction to pay all debts.

Second. A gift in trust of the estate to uses, — first of Cyrenius for life, and then of persons in remainder.

Third. Provisos attached to and limiting the generality of the *second* provision.

The office of a *proviso* is to *limit the generality* of some preceding provision, such as the enacting clause of a statute, or provisions conferring property or powers under a deed, a will or a contract. "The proviso is generally intended," said Ch. J. Marshall, "to *restrain* the enacting clause, and "*to except something which would otherwise* have been with- "in it." *Wayman* v. *Southard*, 10 W. 30. "A proviso *carves special exceptions out* of the enacting clause," said

Justice Story. *United States* v. *Dickson*, 15 P., 165. A proviso "in *deeds and laws* is a *limitation or exception* to "a grant made or authority conferred," said Justice Baldwin. *Voorhees* v. *Bank of U. S.*, 10 P., 471.

What then was the limitation or grant out of the generality of which something was excepted or carved? Manifestly the trust created of the *whole* estate, for the use of himself for life with *remainder to the children.* What is excepted or carved out of that general limitation to uses present and in remainder, which without the provisos would have been within it? Manifestly the precedent gift to the husband of a sufficient fund raised *out of her estate* to pay off this debt which was an incumbrance, and we understand the only incumbrance, upon her estate. This being first done,— the estate having first provided the money for the *payment* of this debt,— the "REMAINDER OVER AND ABOVE" is given to the husband for life, with remainder to the children. But there is *no gift* at all in remainder to these appellants by this will except of *so much* of the estate as *may remain after raising a fund* sufficient to pay off this incumbrance.

This is conclusively put beyond cavil by the plain language in the second proviso, where power is given to sell and dispose of the real estate, "and *out of the proceeds pay*" off the incumbrance. The will then proceeds, "and "the *remainder over and above what may be required to* "*pay the indebtedness* upon said property, the same being "now encumbered," to be invested, and reinvested, "such "*re-investment* to continue to be held" upon the same trust, "that is to say," Cyrenius to have the use during his life, the remainder to go to the children. *There is here a gift to the husband, out and out, of a fund from this estate sufficient to pay off this incumbrance;* for this the whole

estate, real and personal, is charged, and the *residue* is given to him for life, with remainder to these defendants. Such a gift as this of property, or of a right to take and receive it from the estate, became at once assets, legal or equitable, as the case may be, for the payment of this debt. It is of no consequence, in fact, whether or not Mrs. Beers intended, after paying this debt, to make her husband a debtor for the amount to her estate. But it is very clear from her will that she had *no such intention*. There is not the slightest suggestion of an idea of keeping the debt alive against him; but on the contrary, the express provision that only the "*remainder over and above*" what was required for the payment of the incumbrance was to be *held in trust* for the uses for life and in remainder, conclusively disproves the suggestion. She had no idea of holding him liable to her or her estate, and she intended to pay this debt for him. She assumed, as to her husband, this debt, which was already hers as to all other persons, and charged its payment upon her estate, and, *as against the appellants*, made herself the primary debtor.

The whole provision therefore of the will is first to raise a sum of money to pay off this incumbrance on the estate, and then to hold the residue for the life use and the remainder. The provision thus made for the payment of this debt would enure also to the benefit of the creditor. The debtor to whom and for whose benefit the fund thus provided was given, and the agent or trustee through whose instrumentality the money was to be raised out of the estate, were one and the same person. The husband had had authority from his wife, and her consent, to do all that he did do. But even this trust cannot fail of sufficiency. The testamentary gift for the benefit of the debtor by the payment of his debt is an asset to the benefit of which

the creditor is entitled. The husband, the legatee, acquired a vested right to the value of the provision, which, as an interest given to him, and vested in him, was subject to the ordinary legal incidents attaching to property. It is of no legal consequence that the trust was not designedly established or the interest given for the sake of benefiting the creditor. To every property right the ordinary legal incidents must attach; and not even an express declaration that a creditor should not have the benefit of such a trust or gift; nothing short of a clear limitation over of the gift would be operative to prevent the right of a creditor from attaching to the interest given to the debtor. It is needless to accumulate authorities upon this proposition. *Brandon* v. *Robinson*, 18 Ves., 429; *Snowdon* v. *Dales*, 6 Sim., 524; *Graves* v. *Dolphin*, 1 Sim., 66; Lewin on Trusts [*133].

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109-357

SUPREME COURT U.S.
FILED
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IN THE

Supreme Court of United States.

RISSA J. WARNER,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

Opinion of Mr. Justice Harlan, in the Circuit Court.

SUPPLEMENT TO BRIEF FOR APPELLEE.

The opinion of Mr. Justice Harlan, in the court below, was in the form of a letter addressed to all the counsel in the cause. We submit, in connection with our printed argument, the body of that opinion, which is as follows:

"The will of Mrs. Beers is a little involved, but I am satisfied as to what was her intention.

"The will gives the husband power to encumber the estate by way of mortgage, or trust deed, or otherwise, and renew the same for the purpose of raising money to pay off any and all incumbrances then on her estate. The debt in suit was then an incumbrance upon her estate. She declares that any trust deed or mortgage, placing an incumbrance upon the estate, should be as valid as though the husband held an absolute estate in the property.

"He was given power in his discretion, during his life, to sell and dispose of any or all the real estate of the wife of which she might die seized or possessed, as though he had an absolute estate in such property. But of the proceeds of any such sale he was authorized to pay any incumbrances upon the property, reinvest the surplus remaining after such payments, the reinvestment to be held to his own use during life, with right of sale, and to encumber and reinvest, and the remainder, upon his death, to go to the testatrix's children named, and their heirs forever.

"It seems to me entirely clear that the husband could have sold any of the estate for the purpose of paying off the debt in suit. He could have sold the mortgaged property itself for that purpose. If so, I cannot understand why he might not have exercised the lesser power of extending the debt, upon the mortgage already executed. Had he mortgaged this property to some other person for an amount equal to the debt in suit, and applied the money thus raised to the payment of that debt, the new mortgage would certainly have been good. Had he executed to the insurance company, after the maturity of the debt, an entirely new mortgage, and thus canceled the one now sought to be foreclosed, such new mortgage would have been within the power conferred by the will. It seems to me that the extension of the time for the payment of the debt, leaving the old mortgage to stand as security, was a substantial execution of the power to execute a new mortgage to pay off existing incumbrances. The estate which the children took was that which remained in the form of re-investment, or in its original shape, or in any other form, in the hands of the husband, at his death.

"Mrs. Beers was in the position of surety for her husband. But the extension effected by her husband, after her

death, was not in derogation of the rights of her devisees. What was done in that regard was in pursuance of her consent, given in her lifetime. Her estate cannot escape responsibility for the debt in suit, when nothing has been done in violation of the provisions of her will. She gave her husband the broadest possible discretion to provide for all incumbrances upon her estate, making no distinction between incumbrances, as to whether they were created for her own debts or for the debts of her husband, for which her property had, by her act, become bound.

"The defense must, therefore, be overruled."

Respectfully submitted,

EDWARD S. ISHAM,

Of Counsel for Appellee.